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Supreme Court, U.S.
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No. : 06-156

In the
Supreme Court of the United States

CASILDA E. ROPER-SIMPSON,

Petitioner-Appellant,

-against-

BARRY C. SCHECK, JOHNNIE L. COCHRAN, SANFORD RUBENSTEIN, THOMAS & FIGEROUX, and ESTATE OF CARL W. THOMAS,

Respondents-Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

In a claim by one set of attorneys, who represented Abner Louima in his infamous police brutality case against the City of New York, seeking forfeiture to themselves, of the fees of the original attorneys who represented Mr, Louima, the Second Circuit affirmed the district court's grant of relief. The Second Circuit affirmed despite the fact that: a) the attorneys seeking forfeiture did not allege any injury to themselves; b) they only alleged that petitioner and her colleagues caused injury to Louima; and c) Louima did not authorize the forfeiture claim, and did not know that the Respondents had divided the prospective forfeited fees among themselves. The Second Circuit also affirmed the district court's decision to allocate fees between the petitioner and T&F, despite the fact that this issue had been resolved by these parties, and was no longer "live".

Three questions are presented:

1. Under Article III, do attorneys, who did not allege any injury to themselves, and who were not authorized by the client, have standing to seek forfeiture to themselves, of their co-counsel's fee from the client, based solely upon injuries allegedly done by their co-counsel to the client?

2. Does a federal court have jurisdiction to adjudicate such a fee forfeiture claim in the absence of a showing of standing?

3. In light of the 'case or controversy' requirement of Article III, does a federal court have the authority or jurisdiction to decide an issue which had been rendered moot by the parties before the court?

LIST OF PARTIES

The petitioner in this Court is Casilda E. Roper-Simpson, an attorney duly licensed to practice law in the State of New York at all times relevant to this matter. Petitioner, Carl W. Thomas (deceased) and Brian Figeroux, were the original attorneys who began to provide legal representation to Abner Louima in the immediate aftermath of his brutal encounter with New York City police officers in August 1997. Mr. Thomas and Mr. Figeroux practiced as Thomas & Figeroux. Barry C. Scheck, Johnnie L. Cochran (deceased) and Sanford Rubenstein, were, together with Peter Neufeld, attorneys who subsequently joined Abner Louima's legal team.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Second Circuit did not issue a formal opinion but instead, issued a Summary Order. Said Summary Order was later issued as a Mandate and both are reproduced here as Appendix C. The District Court opinion granting relief, which incorporates the Report and Recommendation of Magistrate Judge Pollak, is reproduced as Appendix B. And excerpts of the relevant portions of the Report and Recommendation ("R&R") are reproduced as Appendix A. The Second Circuit's Order on the Petition for panel and/or *en banc* reconsideration is reproduced as Appendix D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Second Circuit's Summary Order was entered on January 20, 2006, and a timely petition for panel or *en banc* rehearing was filed. Said petition for rehearing was denied by the Second Circuit on April 3, 2006. See Appendix D.

The District Court claimed jurisdiction over this attorney fee claim, which does not involve any fee dispute with the client, as ancillary to its power to regulate attorney admission and withdrawal. Alternatively, the District Court claimed jurisdiction over this fee claim by one set of attorneys against another set, on the basis of the doctrine of supplemental jurisdiction. A189-191[1]. It is doubtful

[1] "A" refers to the Appendix in the Second Circuit Court of Appeals.

whether this is sound in light of the fact that the main case involved the client, Louima, who is not a party to the fee dispute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article III:

Sect.1. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme court and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Sect.2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a state and citizens of another state, between citizens of different States, between citizens of the same state claiming lands under grants of different States, and between a state, or the citizens thereof, and foreign States, citizens or subjects.

.....

STATEMENT OF THE CASE

This is an unusual fee dispute among attorneys which arose out of the August 1997 infamous Abner Louima police brutality incident in New York City. This fee dispute is very unusual because Louima, the client, did not seek forfeiture of counsel's fee, and did not authorize the attorneys seeking relief to do so on his behalf. Moreover, the attorneys seeking relief did not allege any injury to themselves: they did not allege that the Petitioner and her colleagues had caused them any injury. The sole basis on which these attorneys sought forfeiture of their co-counsel's fees is the allegation that Petitioner and her colleagues had caused injury to Abner Louima, a third-party to the fee dispute. A56-A74.

Following Abner Louima's brutal attack by New York City police officers in August 1997, his family tried unsuccessfully for several days, to retain the services of an attorney to represent his interests. At that time, the police had already embarked on a vicious campaign against Louima, labeling him as the victim of rough gay sex.

At great professional and personal risks, and without any fee deposit, the Petitioner and her colleagues, Carl W. Thomas and Brian Figeroux, agreed to represent the then unknown Louima, both in the criminal charges brought against him by the police, and his potential civil rights lawsuit against the police. Petitioner and her colleagues brought Louima's situation to the attention of the United States Attorney for the Eastern District of New York. They also brought Louima's plight to the attention of the general public by involving the press through the late Mike McAlary of the Daily News newspaper.

After public interest in Louima's plight had been generated, Sanford Rubenstein insinuated himself into the

case as part of Louima's legal team. Not long thereafter, the late Johnnie L. Cochran came along, bringing with him, Barry C. Scheck and Peter Neufeld, as co-counsel. Ultimately, Louima and his wife executed one final written retainer agreement with all his attorneys. Under that written retainer, one-third of the total attorney's fee would go to Cochran, Neufeld and Scheck ("CN&S"); one-third to Rubenstein; and one-third to Thomas & Figeroux ("T&F"). It had been agreed between Petitioner and T&F that the Petitioner would share equally with T&F whatever fees were due to T&F.

Events surrounding how CN&S and Rubenstein (herein together referred to as "Cochran Respondents") became attorneys in Louima's case caused an uneasy working relationship among the attorneys, especially between CN&S and T&F. Rather than improve over time, this poor working relationship worsened. Eventually, the Petitioner, Carl W. Thomas and Brian Figeroux had to leave the case.

Louima's civil rights lawsuit was resolved by negotiated settlement without a trial. Meanwhile, the Cochran Respondents, without the authority of their client, Louima, brought a motion seeking to forfeit the entire fee due to T&F and the Petitioner from Louima's case. Also, without Louima's knowledge, the Cochran Respondents agreed among themselves to retain any windfall which might result from the forfeiture of the fees of T&F and the Petitioner. A1020-1021; A1235-1236; Plaintiff's Exhibit 5. The only ground advanced by the Cochran Respondents for seeking this unusual relief is their allegation that Petitioner and T&F had committed various wrongs which caused injury to Louima. The Cochran Respondents never alleged that the Petitioner or T&F did any wrong to them, or that they

suffered any injury as a result of the conduct of the Petitioner and T&F. A56-A74.

In her responsive pleading, Petitioner challenged the standing of the Cochran Respondents to seek forfeiture to themselves of her fees and those of T&F. A75-A90. The Cochran Respondents never amended their pleading to reflect an alternative basis for the forfeiture relief sought. Therefore, the fee dispute proceeded to hearing in the District Court on the basis of this alleged injury to third-party Louima. Prior to the commencement of the fee hearing, the Petitioner and T&F had disagreed as to the respective percentage share of fee as between the Petitioner and T&F. However, during the hearing, the Petitioner and T&F resolved that the Petitioner was entitled to equal share of the fee due to T&F. Thereafter, this agreement was confirmed by the attorneys for T&F in a letter dated May 23, 2003, addressed to Magistrate Judge Pollak, and copied to all counsel of record. A291. Said letter is reproduced here as Appendix E.

That letter of May 23, 2003, confirmed the mootness of the fee dispute, as between the Petitioner and T&F. The only claim left unresolved was the fee forfeiture claim of the Cochran Respondents against the Petitioner and T&F. Despite the mootness of the fee dispute between T&F and the Petitioner, one year later, Magistrate Judge Pollak issued her Report and Recommendation ("R&R") in which she purported to decide a non-existent fee dispute between the Petitioner and T&F. Excerpts of the relevant portions of the R&R are reproduced here as Appendix A. The complete R&R is found in the record on appeal. A91-A264. Judge Sterling Johnson of the District Court issued his decision on September 28, 2004, accepting part of the R&R which included the improper resolution of this moot point. The District Court decision is reproduced here as Appendix B.

Petitioner filed her timely Notice of Appeal on October 13, 2004. A1785-A1786. The Second Circuit affirmed the District Court in a Summary Order issued on January 20, 2006. Appendix B hereto. Petitioner filed a timely petition for panel rehearing and/or rehearing *en banc* on February 3, 2006. The petition for rehearing was denied on April 3, 2006. Said Order of denial is reproduced here as Appendix D.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Decision of the Second Circuit Violates the Case or Controversy Clause of Article III, and Undermines this Court's Established Precedents on the Doctrine of Mootness

The District Court improperly decided a moot point when it purported to resolve a non-existent dispute between the Petitioner and T&F. And the Circuit Court erred in affirming same. The "case or controversy" clause of Article III of the United States Constitution forbids federal courts from deciding moot questions. And this Court has so construed and interpreted same in a long line of precedents. See e.g. Bunting v. Mellen, 541 U.S. 1019 (2004); Frank v. Minnesota Newspaper Ass'n, 490 U.S. 225 (1989); Sosna v. Iowa, 419 U.S. 393 (1975). A question is moot where the issues involved have ceased to exist or are no longer "live". Murphy v. Hunt, 455 U.S. 478, 102 S.Ct. 1181, 1182, 71 L.Ed.2d 353 (1982); County of Los Angeles v. Davis, 440 U.S. 625 (1979).

In affirming the District Court, the Second Circuit stated that it found:

"no abuse of discretion in the district court's denial of an equal division of fees as between Roper-Simpson and

Thomas & Figeroux, notwithstanding a fee-sharing agreement between the two parties. Magistrate Judge Pollak found that the precise terms of the agreement itself are unclear. Moreover, the agreement itself is unenforceable under New York law because it was made without informing the client", citing Naiman v. N.Y. Univ. Hosps. Ctr., 351 F. Supp. 2d. 257 (S.D.N.Y. 2005) (emphasis added).

The Second Circuit erred. Magistrate Judge Pollak issued her R&R on July 21, 2004. A91-A264. One year prior to the issuance of the R&R, the issue of the division of fees as between Roper-Simpson and Thomas & Figeroux, had been rendered moot. A291-A292. See Letter dated May 23, 2003, reproduced here as Appendix E. Therefore, after May 23, 2003, there was no longer any fee dispute between the Petitioner and T&F, which the court was required to resolve or decide. The Circuit Court's decision creates a conflict, not only with that Court's previous decisions but also with the decisions in all the other Circuits. Catanzano v. Wing, 277 F.3d 99 (2d Cir. 2001); Etuk v. Slattery, 936 F.2d 1433 (1991). Furthermore, the Second Circuit's reliance on Naiman is unavailing. While Naiman dealt with an ***attorney/client fee dispute***, this case deals with a ***fee dispute among attorneys.*** There is no fee dispute whatsoever between Louima, on the one hand, and the Petitioner and T&F, on the other. It is the New York State court, and not the District Court which decided Naiman, that can pronounce on what New York law is. DiBella v. Hopkins, 403 F.3d 102 (2d Cir. 2005); The Travelers Insurance Co. v. 633 Third Associates, 14 F.3d 114 (2d Cir. 1994). The New York State Court of Appeals recognizes a distinction between an attorney/client fee dispute and a fee dispute among attorneys only, like the one at bar. See, Lai Ling Cheng v. Modansky Leasing Co., 73 N.Y.2d 454, 458 (1989) ("Where the dispute is only between attorneys, however, the rules are somewhat

different"). See also, Kern v. Karnbach, 27 A.D.2d 954, 279 N.Y.S.2d 252 (2d Dept. 1967).

The case of Warren v. Meyers, 187 Misc.2d 668, 723 N.Y.S.2d 337 (2001), is very instructive indeed. Warren is a medical malpractice contingency *fee* case in which an attorney who was retained by the client on a contingency engaged another attorney. The retained attorney, Jones, engaged the Gallina firm to work with Jones on the client's case. The client never formally retained the Gallina firm, but knew that the Gallina firm was working on his behalf with Jones. The plaintiff in Warren testified that "he did not believe that he ever directly retained the Gallina firm and assumed that Jones, whom he did retain, and the Gallina associate with whom he had been working, Louis Solimano, Esq., were partners". *Id*, at 340. The court held that Jones, the retained attorney, had a direct right to a fee from the client, and that the Gallina firm was entitled to a share of the fee, **as agent of Jones**. *Id*., at 342 (emphasis added).

In the case at bar, Louima, the client, never formally retained the Petitioner, just like the client in Warren who never formally retained the Gallina firm. In both cases, there was no written retainer agreement between the client and the attorney engaged by the retained attorney. Like in Warren, Louima retained T&F who engaged Petitioner, and knew that the Petitioner was working on his behalf.

Louima testified that he first met the Petitioner at the time he first met Carl Thomas and Brian Figeroux; that Messrs. Thomas and Figeroux told him that the Petitioner "was working with them" and that he, Louima, understood that to mean that "they were together and working as one lawyer". A99. The case at bar in indistinguishable, in principle, from Warren where recovery was permitted to the Gallina firm. The Gallina firm in Warren was in an identical situation as the Petitioner at bar.

Assuming, *arguendo*, that the issue of division of fees between Thomas & Figeroux and Petitioner were not moot, Roper-Simpson would still be entitled to equal share of the fee of Thomas & Figeroux, based upon the record. The evidence is that Roper-Simpson did "some work" in connection with the Louima case, and that she did not refuse to make any more substantial contribution to the case. A835-836. Indeed, the district court found that "There has been no evidence of any ethical violations by Ms. Roper-Simpson, who appears to have acted in Louima's interest at all times and did not have any discussions with the press that were not authorized". A228.

In light of the fact that Petitioner did "some work" in the underlying contingency fee civil rights case, and there is no claim by the Cochran Respondents, or any other attorney in the Louima case, that Petitioner refused to make any more substantial contribution, New York courts will not inquire into the precise worth of the services. Benjamin v. Koeppel, 85 N.Y.2d 549, 626 N.Y.S.2d 982 (1995). Given this fact, and the additional fact that T&F had already conceded that Petitioner is entitled to equal share of their fees, the District Court no longer had a discretion in the matter. The Circuit Court was bound to follow Alderman v. Pan Am World Airways, 169 F.3d 99 (2d Cir. 1999). By affirming the district court on this issue, the Second Circuit failed to follow this Court's established precedents on the doctrine of mootness. What is more, without any explanation, the Circuit Court failed to follow its own controlling decision in Alderman.

B. The Second Circuit Affirmed the District Court Despite the Clear *Lack of Standing* By the Party Who Sought Relief, and in Violation of Article III Standing Requirements and This Court's Precedents on Standing

The Second Circuit concluded that, the Cochran Respondents, who did not allege any injury to themselves, have standing to seek to forfeit to themselves, the fee of T&F and Petitioner. This conclusion is contrary to the settled law in this Court, as well as precedents in every other Circuit Court. The Cochran Respondents, as the party asserting federal jurisdiction, bear the burden of establishing their standing under Article III of the Constitution. This Court presumes that federal courts lack jurisdiction unless the contrary appears affirmatively from the record. Renne v. Geary, 501 U.S. 312, 111 S. Ct. 2331, 115 L.Ed.2d 288 (1991). A party seeking relief must plead facts showing that it has standing to assert its claim. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231, 107 L.Ed. 2d 603, 110 S.Ct. 596 (1990).

By its decision, the Circuit Court appears to suggest that a party is entitled to seek relief in federal court without the threshold showing of standing to seek that specific relief. Cf Warth v. Seldin, 422 U.S. 380. It is settled law that the issue of standing must be seen in relation to the nature of the claim asserted. DaimlerChrysler Corporation v. Cuno, 126 S.Ct. 1854 (2006); 164 L.Ed.2d 589; Etuk v. Slattery, 936 F.2d 1433 (2d. Cir. 1991).

The Cochran Respondents articulated their position thus:

"This motion to invalidate the claims to legal fees by Messrs. Thomas and Figeroux, as well as Ms. Roper-Simpson, is made because the conduct of counsel in this case has been so thoroughly contrary to the interests of Mr. Louima, and so contrary to the ethical norms of the legal profession, that it would be a mockery to the legal system, and a great disservice to Mr. Louima and the suffering he has endured, to reward such misconduct" (emphasis added). (A59).

They further stated:

"As set forth below, Messrs. Thomas and Figeroux violated their fiduciary and ethical duties to **Mr. Louima** in three core areas. First, they withdrew from representing **Mr. Louima** without cause; second, they violated their duty to keep **client** information confidential; and third, their willful and unauthorized disclosure of confidential and secret **client** information not only **violated Mr. Louima's instructions,** but also could have significantly injured the interests of their clients in this case" (emphasis added) (A60)[2].

By affirming that the Cochran Respondents had standing to seek forfeiture to themselves, of the fees of their co-counsel, the Circuit Court ignored the facts pleaded by the Cochran Respondents in the District Court for seeking relief. First, they brought the forfeiture motion in their own name. Second, they were seeking to have the fees forfeited to themselves, and not to Louima. Third, they alleged injury to

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[2] Cochran Respondents who seem overly concerned about the alleged ethical violations of Thomas & Figeroux did not report these alleged violations to the Disciplinary Committee of the Bar as they were obligated. Instead, their focus was not even to benefit Louima who suffered these alleged injuries, but to enrich themselves at the expense of Roper-Simpson and Thomas & Figeroux.

Louima, and not themselves, as the only basis for seeking relief. This Court has held repeatedly that a party must plead facts showing that it has standing to assert its claim. In order to have standing, a party must allege a distinct and palpable injury to himself, and cannot rest his claim to relief on the legal rights or interest of third parties (Emphasis added). Warth v. Seldin, 422 U.S. 490, 501, 45 L.Ed.2d 343, 95 S. Ct. 2197 (1975). See also, Kowalski v. Tesmer, 543 U.S. 125 (2004).

Nowhere in their fee motion - the pleading which defines and circumscribes the nature and basis of the relief sought - did the Cochran Respondents ever allege any "distinct and palpable injury" to themselves. Rather, all the injuries which they alleged were done to **Louima** - a non-party to the fee dispute. The Cochran Respondents, as the party seeking relief, rested their claim for relief on Louima's legal interests, and not their own. A56-A74. In her response to the forfeiture motion in the District Court, Petitioner herein challenged the standing of the Cochran Respondents to seek relief for themselves on the basis of injury allegedly done to Louima, a third-party. A75.

The Circuit Court bottomed its finding of standing on the reasoning that all the parties stand to lose or gain financially from the division of fees. Again, insofar as this conclusion extends to the Cochran Respondents, the Court erred. The Petitioner herein had standing in the district court because the Cochran Respondents impleaded her in their motion seeking forfeiture of attorney's fees, including Petitioner's fee. The decision of the District Court on the fee motion was unfavorable to the Petitioner. As such, Petitioner was an "aggrieved party", and had standing to appeal that unfavorable District Court decision. See: Deposit Guaranty National Bank of Jackson, Mississippi v. Roper, 445 U.S. 326; 100 S. Ct. 1166; 63 L.Ed.2d 427

(1980); Concerned Citizens of Cohocton Valley, Inc., v. New York State Department of Environmental Conservation, 1997 U.S. App. LEXIS 36155 (2d Cir. 1997).

Parties are bound by their pleadings. Moreover, issues not raised before the district court are waived. See Telecommunications, Inc. v. Commissioner, 104 F.3d 1229, 1232-33 (10th Cir. 1997). The Cochran Respondents are bound by the only pleaded factual basis for their claim of forfeiture in the District Court - injury to Louima and not to themselves. The Circuit Court had no authority to fashion for the Cochran Respondents a claim which they did not make for themselves. In other words, the Circuit Court could not properly rule that the Cochran Respondents had standing to seek relief because they stand to lose or gain financially from the division of fees since that was never the claim of the Cochran Respondents.

As the parties who invoked the jurisdiction of the district court by seeking relief, the Cochran Respondents bore the burden of satisfactorily demonstrating their standing to seek the specific relief which they were seeking in the District Court. DaimlerChrysler, *Id.* They failed to discharge or carry this burden. Besides, the District Court had resolved the issue of their standing on the basis that the Cochran Respondents could stand in the shoes of Louima - a conclusion that is completely at odds with the hearing record.

Magistrate Pollak stated thus:

"CN&S and the Rubenstein firm essentially stand in the shoes of the Louimas in asserting that T&F's violations of their ethical obligations to their clients were sufficiently egregious to warrant forfeiture of T&F's rights to share the fees". A 212. (Emphasis added).

Magistrate Judge Pollak's invocation of what amounts to the third-party standing exception misconstrues the basis enunciated by this Court for finding third party standing. It also ignores the record evidence in this case. For third party standing to apply, there must be a combination of three situations: 1) the litigant has suffered an injury in fact giving him a sufficiently concrete interest in the outcome of the issue in dispute; 2) the litigant has a close relation to the third party; and 3) there is some hindrance to the third party's ability to protect his or her own interests. See Powers v. Ohio, 499 U.S. 400, 411, 113 L. Ed.2d 411, 111 S. Ct. 1364 (1991), quoting Singleton v. Wulf, (citation omitted). See also, Kowalski v. Tesmer, 543 U.S. 125 (2004). The Cochran Respondents, who did not allege any injury to themselves, failed to meet the case and controversy requirement of Article III.

Leaving aside the Article III case or controversy requirement, the Cochran Respondents also failed to satisfy the prudential considerations which underlie this Court's third party standing jurisprudence. They failed to show that there was such a "close" relationship between them and Louima to invoke third party standing. Moreover, they failed to show that there was a "hindrance" to the ability of Louima, the possessor, to protect his own interests.

In Conn v. Gabbert, 526 U.S. 286, 289-293 (1999), this Court rejected an attorney's attempt to adjudicate the rights of a client. The plaintiff-attorney in Conn, just like the Respondents, failed to assert his own injury in fact as a basis for his standing. Moreover, the record at bar shows that Louima did not authorize the Respondents to seek forfeiture on his behalf. More amazing is the fact that the Cochran Respondents did not even advise Louima that the fee of T&F, which they were seeking to forfeit, had been divided in advance among them the attorneys, without a cent accruing

to the client who was allegedly injured by the conduct complained of. A1020-1021; A1235-1236; Plaintiff's Exhibit 5. The record herein mandates a finding that the Respondents lack any standing to seek said fee forfeiture, whether third party or otherwise. The lower courts should not have reached the merits of the claim without this threshold showing of standing.

C. The Circuit Court Ignored Contemporaneous Evidence Which Undermines Respondents' Later Contention That Petitioner and T&F ***Withdrew Without Cause*** from the Louima Case

While Petitioner and T&F maintain that they were constructively discharged by Louima or withdrew with cause on January 23, 1998, Respondents claimed, for the first time four years later, that Petitioner and T&F withdrew without cause from representing Louima. However, Respondents' contemporaneous conduct, which is part of the record, belies their claim.

On January 23, 1998 - the day that the Petitioner and T&F were forced to resign as Louima's attorneys - Louima wrote a letter which the Respondents helped him draft. In that letter, Louima requested T&F to "**give Sandford Rubenstein an accounting**, within the next month, **for the time** and expenses you **and your colleague Casilda Roper-Simpson have committed on my behalf**" (Emphasis added). A1237; Plaintiff's Exhibit 8. The only rational explanation for this request is a recognition, by Louima and the Cochran Respondents, that the Petitioner and T&F are entitled to fees because they did not withdraw without cause.

Under New York law, an attorney who is discharged for cause or who withdraws from a client's case without cause, is not entitled to any fee. Campagnola v. Mulholand,

76 N.Y.2d 38, 556 N.Y.S.2d 239 (1990). On the other hand, an attorney who is constructively discharged by the client, or who withdraws with cause, from a contingency case is entitled to fees. Martucci v. Brooklyn Children's Aid Soc., 284 N.Y. 585 (1940). It is not unreasonable to presume that when the Cochran Respondents - all eminent New York attorneys - helped Louima draft his January 23, 1998 letter, they knew, or should have known, that a New York attorney who withdraws without cause from a client's matter is not entitled to any fee.

Furthermore, when the attorney/client relationship between T&F and Louima ceased in January 1998, the Daily News reported that Peter Neufeld, one of Louima's new lawyers, told the newspaper that the departing attorneys were "discharged". A1252-1253, Plaintiff's Exhibit 17. The record demonstrates that, neither at the time of the Daily News publication, nor at any other subsequent time, including the fee dispute hearing four years later, did Mr. Neufeld deny this statement which the Daily News attributed to him.

Both the District Court and the Circuit Court ignored these salient facts. Otherwise, the Circuit Court would have reached the only conclusion which the hearing record permits namely, that T&F and the Petitioner were constructively discharged on January 23, 1998.

CONCLUSION

For all of the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 11, 2006

Excerpts of the Report and Recommendation of Magistrate Judge Cheryl L. Pollack, Dated July 21, 2004

Appendix A

INTRODUCTION

On August 6, 1998, plaintiffs Abner and Micheline Louima filed this civil action against the City of New York, the Patrolman's Benevolent Association ("PBA"), various individually named officers of the New York City Police Department ("NYPD"), and members of the PBA, alleging, inter alia, violations of 42 U.S.C. § 1983 in connection with the brutal attack on Abner Louima that occurred on August 9, 1997 and the subsequent alleged cover-up conspiracy by the defendants. The underlying action was settled on July 14, 2001, with the Louimas receiving a total amount of $8.75 million in exchange for dismissal of the claims against all of the defendants except for Officers Charles Schwarz and Francisco Rosario. Pursuant to the settlement agreement, one-third of the total settlement amount, representing the amount to be allocated as attorneys' fees, was deposited in an escrow account to be administered by a trustee appointed by the Court.

On March 12, 2001, prior to the consummation of the settlement, the current attorneys for plaintiffs, the firm of Cochran, Neufeld & Scheck ("CN&S"), and the firm of Rubenstein and Rynecki (the "Rubenstein firm"), filed a motion to invalidate any claims made by the Louimas' prior counsel, Carl W. Thomas, Esq.[1] Brian Figeroux, Esq., the firm

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[1] As a consequence of the untimely and unfortunate death of Mr. Thomas in August 2001, his interest in this matter is being pursued by his Estate. (Supplemental Memorandum of Law in Opposition to Plaintiffs' Application for Fee Forfeiture and for Recovery of Fees Due ("Estate Mem.") at 1). Prior to the hearing, an issue arose as to the extent to which conversations with Mr. Thomas could be related by other witnesses in light of the restrictions of the Dead Man's Statute. That was the subject of a separate Order of this Court dated November 14, 2002, and will not be addressed herein.

of Thomas & Figeroux ("T&F"),[2] and Casilda E. Roper-Simpson, Esq., to share in the legal fees arising from the

However, if the district court disagrees with this Court's finding that T&F withdrew from further representation of the Louimas, or that such withdrawal was without good cause, then, as set forth below, T&F would be entitled to an award of fees. In order to assist the district court in its analysis, this Court will set forth, in the alternative, the basis for and amount of such an award.

D. Misconduct by T&F

In addition to arguing that T&F are not entitled to share in the legal fees due to their withdrawal without cause, CN&S also contend that T&F forfeited any right to fees because they violated the rule of client confidentiality as set forth in D.R. 4-101, by disseminating client confidences and secrets both before and after they ceased their representation of the Louimas. (CN&S Post-Tr. Br. at 113-114).

(1) Standing

In response, T&F and Roper-Simpson contend first that CN&S have no standing to raise the issue of T&F's alleged breach of the Disciplinary Rules. Citing the Restatement (Third) Law Governing Lawyers § 6, T&F argue that "[t]actical deployment of the disciplinary rules ... is highly disfavored," and the fact that a disciplinary rule may provide a basis for sanctions against an attorney "'does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.'" (T&F Mem. at 53

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[2] At the time the Louima family first contacted Messrs. Thomas and Figeroux, the firm of T&F did not exist. The two lawyers subsequently joined as a firm and remained as such until the

(quoting Restatement (Third) Law Governing Lawyers § 6)). Therefore, T&F contend that CN&S have no standing to seek a reduction in fees based on purported breaches of the ethical duties owed by T&F to Louima.

(T&F Post-Tr. Br. at 55).

None of the parties have identified any case law directly on point dealing with a fee dispute between attorneys who are signatories to a fee-splitting contingency fee agreement where one attorney is accused of ethical violations. The cases cited by T&F for the proposition that only the client has a right to assert a claim based on an alleged violation of the disciplinary rules are inapposite. See, e.g., Itar-Tass Russian News Agency v. Russian Kurier, Inc., 1999 WL 58680, at *9 (holding that co-plaintiffs who are not liable for attorneys' fees could not move for sanctions against plaintiff's counsel for a violation of the Disciplinary Rule governing fee splitting since co-plaintiff had not been damaged by the fee splitting arrangement); Heard v. Bonneville Billing & Collections, 216 F.3d 1087 (table) (10th Cir. 2000) (holding that plaintiff lacked standing to challenge a fee splitting arrangement between defendant and defendant's counsel); Pepe & Hazard v. Jones, 33 Conn. L. Rptr. 72, 77 (Conn. Super. Ct. 2002) (excluding testimony of legal ethics expert in dispute between former law partners).

None of these cases deal with a dispute such as the one here, where the Louimas executed a retainer agreement dated November 3, 1997 with all of the attorneys,[94] providing that the various attorneys would be entitled to share a one-third legal fee resulting from the joint efforts of all the attorneys. (Ex. 2). In this agreement, the clients agreed to joint representation by the attorneys, and agreed to a contingency fee of one-third to be

[94] Roper-Simpson was not a party to this agreement.

divided equally between the firms of CN&S, Rubenstein & Rynecki, and T&F. (Id.)

Under the Disciplinary Rules, the division of the one-third fee portion is expressly left to the attorneys to decide. SeeD.R. 2-107(A)(l), N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.12

(requiring only that the client be informed and "consent[ ] to the employment of the other lawyer after a full disclosure that a division of fees will be made"); see also Carter v. Katz. Shandell. Katz & Erasmous. 120 Misc.2d 1009, 1018, 605 N.Y.S.2d 991, 997 (N.Y. Sup. Ct. 1983) (holding that "[a] client is simply to be made aware that another attorney is ... representing her.. .. Any further elaboration or specificity regarding the exact arrangement between the collaborating attorneys is not ethically mandated by [D.R. 2-107]").

Clearly, the Louimas could easily file an application with this Court seeking to have T&F's share of the fees forfeited based on the very same breaches of the Disciplinary Rules that were examined in this fee proceeding. In this case, CN&S and the Rubenstein firm essentially stand in the shoes of the Louimas in asserting that T&F's violations of their ethical obligations to their clients were sufficiently egregious to warrant forfeiture of T&F's right to a share of the fees. To hold otherwise would mean that an attorney who agrees to split a contingency fee with another attorney could blatantly commit untold breaches of the ethical rules to the detriment of the client or withdraw without cause and rest on his laurels while the remaining attorney labors successfully on behalf of the client. If the remaining attorney had no standing to raise these issues of breach in the context of a fee sharing agreement, he would have no recourse to object when the breaching attorney demanded his equal share of the fee. While T&F is correct that, in the absence of the fee splitting agreement among counsel, any fees forfeited by T&F would be returned to the client, here T&F's violations do not vitiate the agreement that

the Louimas have with their other counsel. Collectively, the attorneys are still entitled to receive one-third of the total settlement, and any portion of the fees forfeited by T&F would still be considered to be part of the fee amount to be divided among the remaining counsel. Thus, based on the equities, and the absence of any authority to the contrary, this Court concludes that CN&S have standing to raise alleged ethical breaches by T&F that would otherwise be asserted by the Louimas in the absence of the fee-sharing agreement. (See, e.g. Ex. 2; see also Ex. 60).

(2) Confidences and Secrets

It is well established that "the role of a lawyer vis a vis the interests of his client is categorized as that of fiduciary trustee." Condren v. Grace. 783 F. Supp. 178, 182 (S.D.N.Y. 1992) (citing Cinema 5 Ltd, v. Cinerama. Inc.. 528 F.2d 1384, 1386 (2d Cir. 1976)). See also Hafter v. Farkas. 498 F.2d 587, 589 (2d Cir. 1974). This relationship of trust requires an attorney "to exercise the highest degree of good faith, honesty, integrity, fairness and fidelity," Condren v. Grace. 783 F. Supp. at 182, and "precludes the attorney from having personal interests antagonistic to those of his client," Id.

D.R. 4-101(B) provides that a lawyer shall not reveal a "confidence" or "secret" of a client, or use a confidence or secret of his client to the disadvantage of the client or to provide an. advantage t himself, except under certain limited circumstances. D.R. 4-101(B), N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.19. D.R. 4-101(A) defines "'[c]onfidence' [as] information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client."

D.R. 4-101(A), N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.19. As one court noted: "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not

statements did not cause Louima to terminate T&F earlier. However, because the Court considers T&F's breaches to be extremely serious, this Court respectfully recommends that T&F forfeit a significant portion of their fees due to their unjustified disclosure of their client's secrets.

E. Roper-Simpson's Claim to Fees

Before calculating the amount of fees to which T&F would have been entitled if they had withdrawn with good cause, this Court must first address Ms. Roper-Simpson's claim for fees in this action.

Despite her attorney's protestation to the contrary (see R.S. Tr. III at 76), Ms. Roper-Simpson's position regarding the basis for her right to compensation has changed during the course of the fee dispute. Initially, prior to the commencement of the fee hearing, she conceded that she was not hired by the Louimas, but that she was retained to assist T&F. (See R.S. Mem. At 11 (stating "Ms. Roper-Simpson had no agreement with the Louimas, oral or written")). In her Affidavit filed prior to the fee hearing, she represented that while she was "self-employed" and had "never been an employee" of either Thomas, Figeroux or the T&F firm,[102] "[s]ometime in August 1997, Carl W. Thomas, Brian Figeroux and myself had agreed orally that fees from all the cases which were jointly handled by us would be shared equally among us." (Affidavit of Casilda Roper-Simpson, dated mar. 29, 2001 ("R.S. Aff.") ¶¶

[102] She testified during the fee proceeding that she was never an associate in the firm of T&F, nor a partner either. (R.S. Tr. III at 130)

8-10).

However, during the course of her testimony at the hearing, she was questioned about certain notes in her personal diary which reflected the following: "TC [Carl Thomas] states that [he] think[s] FB [Brian Figeroux] thinks & concern that I [Roper-Simpson] want proportionate.

That's why he's keeping me out of meeting s]." (Ex. 84-O; R.S. Tr. III at 72). She explained that what she was referring to here was a discussion about the arrangement to split fees in the Louima matter three ways with T&F. (R.S. Tr. III at 72). Her notes further indicate that when she pressed for a contract in writing, Figeroux "stated [n]o writing. Attys keep changing, percentage keep changing]." (Ex. 84-O). On the other hand, she testified that Thomas thought she should receive a third. (R.S. Tr. III at 87). When asked at the hearing, whether she had an agreement with the T&F lawyers that there would be a one-third split of any fees received from the Louima matter, she conceded that at the time she wrote these notes, there was no agreement. (R.S. Tr. III at 78 -79). She stated: "Well, there was really never an understanding. That's why we were in the process of negotiating, myself and Brian and Carl." (Id. at 79). However, by late September of 1997, Roper-Simpson believed she had "an oral agreement" of a one-third split among her, Thomas and Figeroux. (Id. at 128, 130,152-53). She also conceded that nowhere in her notes had she indicated that she believed Louima would have to pay her. (Id. at 79).

However, in the course of her testimony during the fee proceedings, Roper-Simpson seemed to suggest that she had an oral agreement directly with the Louimas. When questioned about the statements in her Affidavit, she confirmed that she never had a written agreement with Louima, but her testimony was unclear as to whether she

was asserting a claim that she had an oral agreement with him. When asked by counsel for CN&S whether it was true that "neither Abner nor Micheline Louima ever orally retained you," Roper-Simpson responded: "I can't positively respond to that in terms of yes or no." (R.S. Tr. III at 178). She testified that there was a conversation in January of 1998, in which Louima allegedly said to her and to Thomas and Figeroux that he wanted them to continue to work on the case, and that she believed Louima was referring to her as well since she was in the room at the time. (Id. at 180). When confronted with the statement in her attorney's Memorandum of Law that she was not asserting that she had an oral or written agreement with the Louimas, Roper-Simpson agreed that the statement that she had no written agreement with Louima was correct, but testified that "[i]n reference to the oral part I again say, no. And in any event, I did not read all of this by my attorney." (Id. at 181).

Subsequently, during the course of her testimony, Roper-Simpson's counsel made it clear, that she was seeking fees under two theories: one theory was that she should receive a one-third portion of any amount that is awarded to T&F, and under a separate theory, she argues that she has an independent claim that entitles her to receive fees directly from Louima calculated on a quantum meruit basis. (R.S. Tr. III at 73-76). This second theory, although not spelled out in any detail, seems to appear in Roper-Simpson's legal memorandum submitted prior to the hearing. This memorandum contained the following assertion:

> In the event that the court declines to enforce the Retainer Agreement of November 3, 1997, Ms. Roper-Simpson should be paid from the settlement proceeds...on the theory of quantum meruit. Ms. Roper-Simpson had no agreement with the Louimas, oral or written. However, she rendered her professional services to the Louimas for their benefit.

(R.S.Mem. at 11).

In her post-hearing papers, Roper-Simpson seems to have abandoned any claim that she is seeking fees directly from Louima. However, to the extent that Roper-Simpson may still be claiming that she is entitled to fees directly from Louima as the result of some sort of oral agreement, this Court does not find her testimony to be credible in that regard. First, her representation that she had an agreement with Louima conflicts with her March 2001 Affidavit, and directly contradicts statements in her attorney's memorandum of law. Moreover, she conceded an awareness of the rules of the Second Department which require attorneys in a contingency fee case to file a retainer statement with the Office of Court Administration, and admitted that she had done so here. (R.S. Tr. II at 188-194; N.Y. Comp. Codes R. & Regs., tit 22, § 691.20).[103] Based on the totality of credible evidence, the Court concludes that Ms. Roper-Simpson has no direct claim for fees as the result of an agreement with the Louimas.

Her Post-Hearing Memorandum of Law states: "[i]t is also no longer in dispute that Roper-Simpson has an enforceable fee-sharing agreement with the firm of Thomas & Figeroux." (R.S. Post-Tr. Br. at 9). What she claims now is that:

> She was working pursuant to an oral understanding with Thomas & Figeroux to share fees due to Thomas & Figeroux by virtue of Plaintiffs' Exhibit 2 [the Retainer Agreement].
>
> By virtue of her oral agreement with [T&F] to an equal share of fees in this case, Roper-Simpson has a beneficial interest in Exhibit 2.

(Id. at 28).

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[103] In addition, D.R. 2-106(d) requires all contingent fee agreements to be documented in a writing provided to the client. D.R. 2-106(d), 22 N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.11.

To the extent that she claims entitlement of fees based upon a theory of quantum meruit, Roper-Simpson cites on cases in support of her claim that she is entitled to a share based on a theory that she is a third-party beneficiary to the Retainer Agreement executed by the Louimas and dated November 3, 1997. (R.S. Post-Tr. Br. at 28; Ex. 2).[104] Indeed, it is clear that, given this Court's finding that there was no direct retainer agreement entered into between the Louimas and Roper-Simpson, she cannot recover any portion of the fees, unless she demonstrates that she had an agreement with T&F, in which case her share would come out of the share allocated to T&F.[105] See, e.g., Warren v. Meyers, 187 Misc.2d 668, 673, 723 N.Y.S.2d 337, 342 (N.Y. Sup. Ct. 2001) (finding that firm that performed work on behalf of client with client's knowledge but without valid retainer agreement could not assert direct claim upon client for fee but was entitled to a share of the fee awarded to the referring attorney). Although Roper-Simpson may be entitled to an "equitable lien" on T&F's share of the fees based on an agreement with T&F, made with the client's authority (see discussion supra at 101-105), Roper-Simpson must first establish that she had such an agreement with T&F and that Louima was aware of it and approved of it.

However, it is unclear to this Court on what basis Roper-Simpson is claiming that she had a firm agreement with T&F. While Roper-Simpson asserts that she had an oral agreement to split fees with T&F, her own testimony in this regard is conflicted, and the notes taken contemporaneously

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[104] This Retainer Agreement lists Rubenstein & Rynecki, Thomas & Figeroux, and Johnnie Cochran, Barry Scheck and Peter Neufeld. (Ex. 2). Roper-Simpson's name does not appear anywhere in the document. (Id.)

[105] Her actions and those of T&F in reaching a fee-splitting agreement also arguably violate the Disciplinary Rules. D.R. 2-107 prohibits the division of fees for legal services with an attorney who is not a partner or associate in the lawyer's firm except with the client's consent. D.R. 2-107, N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.12.

with discussions that she had with T&F on this topic suggest otherwise. In addition, Figeroux's testimony does not confirm that any such solid agreement regarding Roper-Simpson's compensation was reached. At the hearing, Figeroux testified that Thomas brought Roper-Simpson in to work on the case (F. Tr. EH at 37), and he also testified that, in his opinion, "she was an employee of Carl W. Thomas. (Id at 64).[106]

Based on Roper-Simpson's and Figeroux's description of the relationship between Roper-Simpson and T&F, it is likely that any fee arrangement would have been discussed primarily between Roper-Simpson and Thomas, who, of course, was deceased at the time of these proceedings. However, while the precise contours of Roper-Simpson's arrangement with T&F are not clear, and in fact may never have been agreed upon, it is also clear that neither Roper-Simpson, Thomas, nor Figeroux thought that Roper-Simpson was working for free. (See R.S. Post-Tr. Br. at 28). In addition, Louima's repeated contacts with Roper-Simpson demonstrate that he was aware of her efforts and did not object to her collaboration with T&F. In fact, Louima acknowledged that he understood that Roper-Simpson was working with T&F, and that she would be paid by them. (L. Tr. at 14-15; see also Ex. 8).

Therefore, to the extent that T&F are entitled to receive fees in this matter, Roper-Simpson is entitled to a share of those fees. At this point, however, given this Court's recommendation that T&F receive no portion of the attorneys' fees, this Court respectfully recommends that Roper-Simpson also receive no fees. In the event that it is determined that T&F should receive a percentage of the fee award, this Court

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[106] He also testified that the firm of T&F was actually created on the same day Figeroux came back from his first visit with Louima in the hospital and met with Thomas. (F. Tr. ffl at 64). From the chronology of events, it appears that Roper-Simpson became involved shortly thereafter.

respectfully recommends that Roper-Simpson receive a portion of those fees awarded to T&F based on her contribution to the Louimas' representation.

F. Fee Determination

In determining an appropriate fee in a case where there has no misconduct by counsel, the New York Court of Appeals has held that "a discharged attorney may recover the 'fair and

the part of CN&S or Rubenstein that would warrant forfeiture of their fees.

CONCLUSION

In summary, this Court respectfully recommends that CN&S' motion for an order forfeiting T&F's share in the fees due to their unjustified withdrawal from the case be granted. In the event the district court disagrees, it is respectfully recommended that there be a significant reduction in T&F's fees based on T&F's unwarranted disclosures of client secrets to the press. This Court further recommends that, if they are to receive any fees, T&F's fees be limited to $212,222.50, of which $35,000 be distributed to Roper-Simpson, and that Figeroux be denied any right to share in those fees based on his conduct in connection with this dispute.

Finally, this Court respectfully recommends that T&F's motion to have CN&S forfeit their fees be denied.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within ten (10) days of receipt of this Report. Failure to file objections within the specified time waives the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(l); Fed. R. Civ. P. 6(a), 6(e), 72(b); Small v. Secretary of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

The Clerk is directed to mail copies of this Report and Recommendation to the parties.

SO ORDERED.

Dated: Brooklyn, New York
July 21, 2004

s/
CHERYL L. POLLAK
United States Magistrate Judge

Memorandum and Order of the United States District Court for the Eastern District of New York Dated September 28, 2004

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ABNER LOUIMA, et. al.,
Plaintiffs,

98 CV 5083 (SJ)
MEMORANDUM
AND ORDER

-against-

THE CITY OF NEW YORK, et al.,
Defendants.

----------X

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JOHNSON, Senior District Judge:

Presently before this Court is the Estate of Carl Thomas ("Thomas" or the "Estate")[1] , Thomas & Figeroux ("T&F"), and Casilda Roper Simpson ("Roper-Simpson") objections to Magistrate Judge Cheryl L. Pollack's ("Magistrate Judge Pollack") Report and Recommendations dated July 21, 2004. Brian Figeroux ("Figeroux") filed no objections to the Report and Recommendation. For the reasons set forth below, the Court adopts Magistrate Judge Pollack's Report and Recommendation in part.

FACTUAL BACKGROUND

The Court will provide a brief outline of the facts. Magistrate Judge Pollack extensively and impressively outlines the factual background and procedural history of the case and the fee dispute before this Court. (See Report and Recommendation ["Report"], dated April 24, 2003, at 1-98.)

On August 9, 1997, Plaintiff Abner Louima ("Louima") was brutally assaulted by one or more police officers after he left a nightclub in Brooklyn, New York. (Id. at 7.) Outside of the nightclub, police officers handcuffed Louima and transported him to the 70th Precinct. (Id,) The officers beat Louima on the way to the precinct, and once there, an officer took Louima into a bathroom and shoved a stick into his rectum. (Id.) The details of Louima's assault were widely covered in the New York press and nationally. Immediately following his assault and while criminal charges were pending against him, Louima orally retained the legal services of T&F for purposes of bom his then pending criminal charges and any potential civil-action, -(Id. at 7-10.) T&F brought Roper-Simpson into the case. Louima did not retain Roper-Simpson, but rather was told that Roper-Simpson would be "working with [T&F]," and that he

[1] In August 2001, Thomas died. His interest in this matter is being pursued by his Estate.

understood that "she would be paid by T&F." (14 at 9.)

On August 15, 1997, Louima retained Sanford Rubenstein ("Rubenstein") of Rubenstein and Rynecki (the "Rubenstein firm") to represent him in the civil matter. (Id. at 19.) Lastly, on August 25, 1997, Louima retained the firm of Cochran Neufeld & Scheck ("CN&S") "to investigate and pursue a claim for personal injury and civil rights violations and to represent him in connection with the state and federal criminal and civil rights investigations relating to this incident." (Id at 25, 27.) On October 6, 1997, T&F, the Rubenstein firm, and CN&S entered into an "Agreement By and Between counsel," stating that the total attorneys' fees shall not exceed 33 1/3 percent of the net recovery and that the fees will be divided amongst counsel. (Id at 27.) On November 3, 1997, Louima executed another Retainer Agreement, specifying that the total amount of legal fees, representing 33 1/3 percent of any total net recovery, would be divided equally, with T&F, the Rubenstein firm, and CN&S each receiving "eleven (11) and one-ninth (1/9) percent." (Id at 28.)

Although heatedly contested, on January 23, 1998, T&F and Roper-Simpson withdrew from further representation of Louima. (Id. at 113-21.) Following T&F's withdrawal from the case, the Rubenstein firm and CN&S entered into an "Amendment to [the] Agreement By and Between Counsel," in which they agreed that (a) the Rubenstein firm would receive eleven (11) percent of any portion of the eleven (11) percent of the gross recovery to which Thomas & Figeroux are not entitled to; and (b) CN&S would receive 89% of the 11% of the gross recovery to which Thomas & Figeroux are not entitled to." (Id. at 28-9.)

On August 8, 1998, Plaintiffs Abner and Micheline Louima (the "Louimas") filed this civil action alleging violations of 42 U.S.C. -§ 1983 in connection with the brutal

attack. On March 21, 2001, the Rubenstein firm and CN&S filed the instant motion to prevent Thomas, Figeroux, the firm of T&F, and Roper-Simpson from receiving attorneys' fees in connection with the litigation. (Id. at 4.) On July 14, 2001, the case settled, resulting in an award of $8.75 million to the Louimas. (Id.) This Court referred the fee dispute to Magistrate Judge Pollack. After voluminous briefing and numerous hearings, Magistrate Judge Pollack recommended that: (1) T&F be denied any share of the attorneys' fees in the litigation because they voluntarily withdrew from further representation of the Louimas without good cause, or, (2) in the alternative, if T&F are to receive attorneys' fees, their amount should be reduced due to the disclosure of client confidences and secrets in violation of disciplinary rules. The Estate, T&F, and Roper-Simspon filed objections to Magistrate Judge Pollack's Report and Recommendations. Figeroux did not file objections.

STANDARD OF REVIEW

A district court judge may designate a magistrate to hear and determine certain motions pending before the court and to submit to the court proposed findings of fact and a recommendation as to the disposition of the motion. See 28 U.S.C. § 636(b)(l). Within ten (10) days of service of the recommendation, any party may file written objections to the magistrate's report. Id. Upon *de novo* review of those portions of the record to which objections were made, the district court judge may affirm or reject the recommendations. Id.
The court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendation to which no objections are addressed. See Thomas v. Arn. 474 U.S. 140, 150 (1985). In addition, failure to file timely objections may waive the right to appeal this Court's Order. See 28 U.S.C. § 636(b)(l); Small v.

Sect'v of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

DISCUSSION

The Rubenstein firm and CN&S contend that T&F should not receive any portion of the legal fees in this matter because they withdrew from representing the Louimas without cause and violated their ethical duty to keep client confidences and secrets confidential. The Court will consider these issues in turn.

I. Did T&F and Roper-Simspon withdraw from the case without cause?

Magistrate Judge Pollack recommended that T&F be denied attorneys' fees because they withdrew from the litigation without cause. (Id. at 113-27.) Crediting the testimony of Louima, Magistrate Judge Pollack found that T&F voluntarily withdrew from the case after Louima gave them one last chance to follow his instructions to cease speaking to the press without first obtaining his authorization. (Id. at 113-14.)

Magistrate Judge Pollack rejected T&F's and Roper-Simpson's contentions that they were fired and their alternative argument that they were forced off the case by CN&S' efforts to alienate them from Louima. (Id. at 113-21.) Magistrate Judge Pollack found that there was no credible evidence showing a concerted effort by CN&S to alienate Louima from T&F. (Id. at 118.) Although Magistrate Judge Pollack acknowledged a break-down in T&F's and CN&S' working relationship, she found that their poor relationship was attributed in large part by T&F's behavior. (Id. at 120.) Thus, Magistrate Judge Pollack refused to allow the state of T&F's poor relationship with CN&S to justify their departure, (Id at 120-21.)

Although the Court agrees with Magistrate Judge Pollack that T&F and Roper-Simpson withdrew from the case without cause, in the interest of equity, the Court finds that the Estate of Thomas and Roper-Simpson are entitled to fees based on work performed in the early stages in the litigation.

II. Did T&F forfeit their right to attorneys' fees?

In the event that T&F and Roper-Simpson were found not to have withdrawn from the case, or that such withdrawal was not without good cause, Magistrate Judge Pollack found that T&F is entitled to attorneys' fees. Magistrate Judge Pollack rejected CN&S' argument that T&F forfeited any right to attorneys' fees because they violated the rule of client confidentiality as set forth in D.R. 4-101 by disseminating client confidences and secrets both before and after they ceased their representation of Louima.[2] (Id. at 139.) Magistrate Judge Pollack rejected claims that CN&S and the Rubenstein firm lacked standing to challenge T&F's right to attorneys' fees based on ethical violations. (Id. at 123.)

However, finding that T&F did in fact disclose client secrets to the press, Magistrate Judge Pollack recommended that T&F forfeit a significant portion of their fees under the fee sharing agreement. Magistrate Judge Pollack found that Roper-Simpson's award of attorneys' fees should not be reduced because there "has been no evidence of any ethical violations by Ms. Roper-Simpson, who appears to have acted in Louima's interest at all times and did not have any discussions with the press that were not authorized." (Id. at 139 n. 101.) Magistrate

---

[2] D.R. 4-101(b) provide that a lawyer shall not reveal a "confidence" or 'secret" of a client, or use a confidence or secret of his client to the disadvantage of the client or to provide an advantage to himself, except under certain limited circumstances. D.R. 4-101(B), N.Y. Comp. Codes R. & Regs., tit. 22 1200.19.

Judge Pollack noted that any award given to T&F is in "recognition of the fact that T&F did perform a valuable service to Louima in the early weeks following the incident." (Id. at)

In determining the reasonable value of T&F's and Roper-Simpson's services, the Court considered the standing of the lawyers at the bar, T&F's contributions to the case, and the work performed by CN&S and Rubenstein. Magistrate Judge Pollack noted that CN&S collectively had more experience with complex litigation in general and civil rights cases in particular than Thomas, Figeroux, and Roper-Simpson, and that CN&S did the lion's share of the work leading to the settlement of the litigation. Magistrate Judge Pollack rejected T&F's and Roper-Simpson's claims that they expended many hundreds of hours on behalf of Louima. Magistrate Judge Pollack noted that they failed to submit time records for work allegedly performed on the case. After considering the duties performed and time expended on the case, Magistrate Judge Pollack found that T&F radically overstated the value of .their contribution to the case.

After comparing the amount and nature of the work performed by T&F and Roper-Simpson with that of the other lawyers, Magistrate Judge Pollack concluded that "[i]n absence of any fee sharing agreement, and had they committed no breaches of their ethical violations, T&F and Roper-Simpson's contributions to the Louimas' case would I amount to at most 10 percent of the time and services rendered in the case, or $303, 175.01." Magistrate Judge Pollack then applied a 30 percent reduction for ethical violations committed by T&F, which resulted in a total fee of $212,222.50.

In determining whether the $212,222.50 figure was an appropriate portion of the fees for T&F and Roper-Simpson, Magistrate Judge Pollack next estimated T&F's fees using the lodestar method. After applying the lodestar method, Magistrate Judge Pollack found that Thomas and Figeroux each were entitled to $78,400.00, and Roper-Simpson is

entitled to $35,000. Magistrate Judge Pollack concluded that Figeroux was not entitled to any fees because he filed an affidavit with the Court that contained at least one false statement and perjured himself while testifying during the fee proceeding. Magistrate Judge Pollack recommended that his share revert to the firm of T&F, or in this case, the Estate.[3]

In their objections, the Estate, T&F, and Roper-Simpson contend that Magistrate Judge Pollack wrongly found that the Rubenstein firm and CN&S had standing to challenge T&F's right to attorneys' fees based on purported ethical violations. The parties further contend that Magistrate Judge Pollack wrongly calculated the amount of attorneys' fees awarded.

The Estate and T&F request that T&F be awarded at least ten percent of the fees, or $303,175.01. Roper-Simpson requests to share equally in the fees of T&F. Roper-Simpson requests one-third (1/3) of the fees due to T&F, and if Figeroux is not entitled to any fee award, she wants one-half of his portion, with the other half going to the Estate of Carl Thomas. Roper-Simpson contends that she was not an employee of T&F, but rather there existed a joint venture between her and T&F to work on the Louima case.

Roper-Simpson also objects to the manner in which Magistrate Judge Pollack calculated the award of fees. Roper-Simpson asserts that a more reliable indicium of how to calculate the fees of the attorneys in the case is the significance of their contributions. Roper-Simpson contends that the most

---

[3] Magistrate Judge Pollack found "Figeroux's conduct in connection will this fee proceeding to be so beyond the bounds of ethical conduct that it warrants a referral to the Disciplinary Committee of the Bar and a recommendation that he be barred from further practice in this Court." (Id. at 170 n. 119.) Magistrate Judge Pollack declined to make that recommendation "without first affording Figeroux an opportunity to respond and provide a justification or explanation for his conduct." (Id.) This issue is not before the Court at this time

significant events in the case, to wit, early press coverage and the early involvement of the U.S. Attorney's Office, were events in which she was involved.

The Court rejects the Estate's, T&F's, and Roper-Simpson's contention that the Rubenstein firm and CN&S lack standing to challenge their award of fees based on purported ethical violations. The Court agrees with Magistrate Judge Pollack that "CN&S and the Rubenstein firm stand in the shoes of the Louimas in asserting that T&F's violations of their ethical obligations to their clients were sufficiently egregious to warrant forfeiture of T&F's right to a share of the fees." (Id. at 123.) Although there is no case directly on point, the Court further agrees with Magistrate Judge Pollack that "[t]o hold otherwise would mean that an attorney who agrees to split a contingency fee with another attorney could blatantly commit untold breaches of the ethical rules to the detriment of the client or withdraw without cause and rest on his laurels while the remaining attorney labors successfully on behalf of the client." (Id.) After carefully considering the Estate's, T&F's, and Roper-Simpson's objections, the Court adopts Magistrate Judge Pollack's calculation of attorneys' fees, in which the Estate was awarded $156,800, and Roper-Simpson was awarded $35,000.[4]

---

[4] The Court also agrees with magistrate Judge Pollack's finding that no forfeiture of the Rubenstein firm's and CN&S' attorneys' fees were warranted.

CONCLUSION

After considering the parties' arguments, this Court adopts and affirms Magistrate Judge Pollack's report and recommendation in part.

Dated: September 28, 2004
Brooklyn, New York

s/
Senior U.S.D.J.

SO ORDERED.

Summary Order of the United States Court of Appeals for the Second Circuit, Dated January 20, 2006, and Issued as a Mandate on April 4, 2006

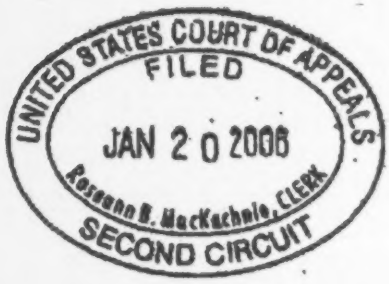
Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York on the 20th day of January, two thousand six.



PRESENT: HON. DENNIS JACOBS,
HON. PIERRE N. LEVAL,
HON. CHESTER J. STRAUB,
Circuit Judges.

———————————————————————————X

CASILDA E. ROPER- SIMPSON,

Interested-Party-Appellant,

04-5533-cv

-v.-

BARRY C. SCHECK, JOHNIE L. COCHRAN and SANFORD RUBENSTEIN,

Appellees,

ABNER LOUIMA and MICHELINE LOUIMA,

Plaintiffs,

CITY OF NEW YORK, NEW YORK POLICE DEPT, PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, individually and in their official capacity as New York City Police Officers, JUSTIN VOLPE, CHARLES SCHWARZ, MICHAEL BELLOMO, JEFFREY FALLON, FRANCISCO ROSARIO, ROLANDO ALEMAN, WILLIAM F. WALSH, JEREMIAH QUINLAN, individually, in his official capacity as a New York City Police Officer, and as a PDA Delegate, LOUIS MATARAZZO, individually and in their official capacity, WILLIAM PAGAN, FRANK BIRNBAUM, individually, and in their official capacity as New York City Police Officers, and in their official capacity as agents of the PBA,MICHAEL IMMITT, MARCELLA MAKEBISH, PATRICK O'SULLIVAN, individually and in their official capacity, JOHN DOES, police officers and non-uniformed employees of the New York Police Department, the identity and number of whom is presently unknown; individually and in their official capacity as New York City Police Officers, RICHARD ROES, supervisory police officers

of the City of New York, the identity and number of whom is presently unknown; and individually and in their official capacity as police officers and/or agents for the PBA, WILLIAM WOES, agent for the PBA, the identity and number of whom is presently unknown, and TIMOTHY LEE, in their official capacities as President of the PBA,

Defendants-Cross-Defendants.

PETER BLAICH, individually, in his official capacity as a New York City Officer and as a PBD Delegate, JOSEPH O'BRIEN, individually, in their official capacity as New York City Police Officers, and as PBA Delegates, JEREMIAH DALY, individually, in their official capacities as New York City Officers, and as PBA Delegates, PATRICK LYNCH, individually, and in their official capacity as agents of the PBA, ANTHONY ABBATE, individually and in their official capacity as employees of the Emergency Medical Service for the City of New York, THOMAS WEISE, in his official capacity as President of the PBA and Thomas Bruder,

Defendants-Cross-Claimants-Cross-Defendants.

----------X

APPEARING FOR INTERESTED-PARTY -APPELLANT:

K.C. OKOLI, New York, New York

APPEARING FOR APPELLEES THE ESTATE CARL W. THOMAS AND THOMAS & FIGEROUX:

BRADLEY D. SIMON, Simon & Partners LLP,
New York, New York

APPEARING FOR APPELLEES BARRY C. SCHECK, JOHNNIE L. COCHRAN, PETER NEUFELD AND SANFORD RUBENSTEIN:

MICHAEL ROSS, Law Offices of Michael S. Ross, New York, New York

Appeal from the Order of the United States District Court for the Eastern District of New York (Johnson, J.) dated September 28, 2004, resolving fee dispute among counsel.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Order of the district court be AFFIRMED.

Caisilda E. Roper-Simpson ("Roper-Simpson") appeals from the September 28, 2004 Memorandum and Order of theUnited States District Court for the Eastern District of New York (Johnson, J.) finally determining the fee disputes among lawyers who provided legal services to Abner Louima: Roper-Simpson; Brian Figeroux and Carl W. Thomas ("Thomas & Figeroux"); Johnnie L. Cochran, Peter Neufeld, and Barry C. Scheck ("CN&S"); and Sanford Rubenstein ("Rubentstein"). Familiarity is assumed as to the facts, the procedural context, and the issues specified for appellate review.

As to the parties' standing challenges: all of the parties stand to lose or gain financially from the division of fees. Roper-Simpson, and CN&S and Rubenstein therefore have standing to bring the fee dispute and to press this appeal.

Turning to the merits of Roper-Simpson's appeal, "[w]e review a district court's decision as to whether to award attorney's fees for abuse of discretion." Herman v. Davis Acoustical Corp., 196 F.3d 354, 356 (2d Cir. 1999)

see also Universal Acupuncture Pain Servs., P.C. v. Ouadrino & Schwartz, P.C., 370 F.3d 259, 262 (2d Cir.2004). Magistrate Judge Pollak heard days of testimony regarding the work performed by Roper-Simpson and Thomas & Figeroux. The different metrics upon which this work could be valued were carefully considered. We find no abuse of discretion in the district court's estimate of hours of work performed by the attorneys or in the calculation of fees based on the lodestar method.

We likewise find no abuse of discretion in the district court's denial of an equal division of fees as between Roper-Simpson and Thomas & Figeroux, notwithstanding a fee-sharing agreement between the two parties. Magistrate Judge Pollak found that the precise terms of the agreement are unclear. Moreover, the agreement itself is unenforceable under New York law because it was made without informing the client. SeeNaiman v. N.Y. Univ. Hosps. Ctr., 351 F. Supp. 2d 257, 263 (S.D.N.Y. 2005); Code Prof. Resp. D.R. 2-106(D), N.Y.Comp. Codes R. & Regs. tit. 22, § 1200.11(d). The district court did not abuse its discretion in declining to follow the agreement and instead awarding fees in quantum meruit based on work actually performed.

For the reasons set forth above, the Order of the district court is AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:

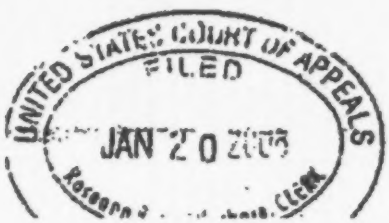
_____s/_____
Lucille Carr, Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 20th day of January, two thousand six.



PRESENT: HON. DENNIS JACOBS,
HON. PIERRE N. LEVAL,
HON. CHESTER J. STRAUB,
Circuit Judges.

———————————————————————X

CASILDA E. ROPER-SIMPSON,

Interested-Party-Appellant,

-v.-

04-5533-cv

BARRY C. SCHECK, JONNIE L. COCHRAN and SANFORD RUBENSTEIN,

Appellees,

ABNER LOUIMA and MICHELINE LOUIMA,

Plaintiffs,

CITY OF NEW YORK, NEW YORK POLICE DEPT, PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, individually and in their official capacity as New York City Police Officers, JUSTIN VOLPE, CHARLES SCHWARZ,

ISSUED AS MANDATE
4/11/06

Order of the United States Court of Appeals for the Second Circuit, Dated April 3, 2006, Denying the Petition for Panel Rehearing

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date: 4/3/06

Docket Number: 04-5533-cv
Short Title: Louima (Roper-Simpson) v. City of New York
DC Docket Number: 98-cv-5083
DC: EDNY (BROOKLYN)
DC Judge: Honorable Sterling Johnso

At a state Term of the United States Court of Appeals for the Second Circuit held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 3rd day of April two thousand.

Present:

Hon. Dennis Jacobs, CJ

Hon. Pierre N. Leval, CJ

Hon. Chester J. Straub, CJ

CIRCUIT JUDGES

A petition for panel rehearing having been filed herein by Appellant Casilda E. Roper-Simpson

Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

For the Court,
Roseann B. MacKechnie, Clerk

By: s/_____
Motion Staff Attorney

Letter, Dated May 23, 2004, From Schlam Stone & Dolan LLP to Magistrate Judge Cheryl L. Pollak with Copies to Michael S. Ross, Esq., K.C. Okoli, Esq. And Bradley D. Simon, Esq. Confirming The Resolution of the Fee Dispute Between Roper-Simpson and Thomas R. Figeroux

Appendix E

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LEAH M. CAMPBELL

May 23, 2003

BY FAX

Hon. Cheryl L. Pollak
United States Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Abner Louima, *et al.* v. City of New York, *et al*, 98-cv-5083 (SJJ)(CLP)

Dear Magistrate Judge Pollak:

We represent Brian Figeroux, Esq. and the law firm of Thomas & Figeroux in connection with the fee dispute among Mr. Louima's counsel in the above-referenced matter. We write to briefly advise the Court of a development that, in our view, narrows the issues before the Court for post-hearing resolution.

At page 9 of his recent submission, Mr. Okoli wrote that "it is no longer in dispute" that his client "has an enforceable oral fee-sharing agreement with the firm of Thomas &

Figeroux." The context of this assertion may be unclear, and it is criticized in Mr. Ross' brief at pp. 39-40. To provide appropriate context and avoid the unnecessary expenditure of judicial resources, this will confirm that Thomas & Figeroux has agreed not to contest Ms. Roper-Simpson's right to an equal one-third share in the net proceeds of this litigation.

Respectfully submitted,

s/_____
Thomas A. Kissane

Cc: Michael S. Ross, Esq.
(By fax)

K.C. Okoli, Esq.
(By fax)

Bradley D. Simon, Esq.
(By fax)

Supreme Court, U.S.
FILED
JUN 22 2006
OFFICE OF THE CLERK

No. : 06-156

In the

Supreme Court of the United States

CASILDA E. ROPER-SIMPSON,

Petitioner-Appellant,

-against-

BARRY C. SCHECK, JOHNNIE L. COCHRAN, SANFORD RUBENSTEIN, THOMAS & FIGEROUX, and ESTATE OF CARL W. THOMAS,

Respondents-Appellees.

SUPPLEMENTAL APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

ABNER LOUIMA, et al.,

Plaintiffs,

- against-

CITY OF NEW YORK, et al.,

Defendants.

----------X

REPORT AND RECOMMENDATION
98 CV 5083 (SJ)

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INTRODUCTION

On August 6, 1998, plaintiffs Abner and Micheline Louima filed this civil action against the City of New York, the Patrolman's Benevolent Association ("PBA"), various individually named officers of the New York City Police Department ("NYPD"), and members of the PBA, alleging, inter alia, violations of 42 U.S.C. § 1983 in connection with the brutal attack on Abner Louima that occurred on August 9, 1997 and the subsequent alleged cover-up conspiracy by the defendants. The underlying action was settled on July 14, 2001, with the Louimas receiving a total amount of $8.75 million in exchange for dismissal of the claims against all of the defendants except for Officers Charles Schwarz and Francisco Rosario. Pursuant to the settlement agreement, one-third of the total settlement amount, representing the amount to be allocated as

attorneys' fees, was deposited in an escrow account to be administered by a trustee appointed by the Court.

On March 12, 2001, prior to the consummation of the settlement, the current attorneys for plaintiffs, the firm of Cochran, Neufeld & Scheck ("CN&S"), and the firm of Rubenstein and Rynecki (the "Rubenstein firm"), filed a motion to invalidate any claims made by the Louimas' prior counsel, Carl W. Thomas, Esq.,[1] Brian Figeroux, Esq., the firm of Thomas & Figeroux ("T&F"),[2] and Casilda E. Roper-Simpson, Esq., to share in the legal fees arising from the Louimas' civil action. In their motion,

---

[1] As a consequence of the untimely and unfortunate death of Mr. Thomas in August 2001, his interest in this matter is being pursued by his Estate. (Supplemental Memorandum of Law in Opposition to Plaintiffs' Application for Fee Forfeiture and for Recovery of Fees Due ("Estate Mem.") at 1). Prior to the hearing, an issue arose as to the extent to which conversations with Mr. Thomas could be related by other witnesses in light of the restrictions of the Dead Man's Statute. That was the subject of a separate Order of this Court dated November 14, 2002, and will not be addressed herein.

[2]2At the time the Louima family first contacted Messrs. Thomas and Figeroux, the firm of T&F did not exist. The two lawyers subsequently joined as a firm and remained as such until the untimely and unfortunate death of Carl Thomas in August 2001. (Estate Mem. at 1). For purposes of this Report, the two attorneys will be referred to as "T&F" regardless of whether they had formally joined as a firm at the time. Similarly, Messrs. Cochran, Scheck and Neufeld were not joined as a single firm when they were initially retained by Louima. (See Retainer Agreement, dated November 3, 1997, Ex. 2). According to Peter Neufeld, CN&S was formed after the commencement of the Louima litigation so that the lawyers in the firm could focus primarily on civil rights cases, "where the cases themselves could perhaps be a basis for systematic reform." (Transcript of Testimony of Peter Neufeld, October 24, 2002 ("N. Tr. 1"), at 12). For ease of reference, the three attorneys are referred to herein as "CN&S."

CN&S contend that T&F should not receive any portion of the legal fees in this matter because they violated their ethical and fiduciary duties to Louima in three ways: (1) they withdrew from representing their client without cause; (2) they violated their ethical duty to keep client information confidential; and (3) by disclosing this information, they violated Louima's express instructions to the detriment of Louima. With respect to Ms. Roper-Simpson, CN&S contend that since she was never retained by the Louimas, her right to claim legal fees is entirely derivative of T&F's entitlement to fees, and must fail for the same reasons. (See Plaintiffs' Proposed Findings of Fact and Conclusions of Law ("CN&S's Post-Trial Br.") at 109)[3]

T&F have a vastly different version of events. They contend that when Louima initially contacted T&F with his story of police brutality, T&F, "[d]espite the risks of pursuing such spectacular allegations," undertook to bring Louima's case to the prosecutors and the public and, through "enormous time, effort, energy and courage[,] . . . transform[ed] [Louima] from an anonymous immigrant with dubious claims . . . into a nationally known victim of egregious police brutality[,]" thereby virtually ensuring "an easy victory" in Louima's civil case. (Memorandum of Law in Opposition to Plaintiffs' Application for Fee Forfeiture and For Recovery of Fees Due ("T&F's Post-Trial Br.") at 1-2). T&F contend that after they had "overcome these obstacles and the prospect of a large recovery was apparent," Cochran, through "[d]issembling," "insinuated his way into the case as lead counsel"

---

[3] CN&S have filed a separate motion for sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 based on an affidavit filed by Figeroux in connection with the fee proceedings. That motion has not been fully briefed and will not be addressed herein.

and "began a campaign to exclude" T&F by alienating them from Louima through, among other things, false charges that Figeroux had leaked information to the press regarding Louima's retraction of the "Giuliani time" statement.[4] (Id. at 2).[5]

A hearing was held before this Court beginning on October 16, 2002,[6] which culminated with the filing of extensive briefs by all parties. Having heard the testimony of each of the witnesses and carefully considered all of the papers submitted by the interested parties, this Court makes the following findings of fact and¶ conclusions of law.

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[4] See discussion infra at 59.

[5] In their original memorandum of law filed prior to the fee hearing, T&F asserted that not only were they entitled to one-third of the total attorneys' fees as set forth in the fee sharing agreement with CN&S, but they were seeking an award "substantially in excess of 50 percent." (T&F Mem. of Law dated April 18, 2001 at 23-24). However, during the hearing, counsel for T&F indicated that they would not seek more than the one-third provided for in the agreement that was entered into between counsel. (See Transcript of testimony of Sanford Rubenstein on November 18, 2002 ("R. Tr.") at 83). Subsequently, in T&F's post-hearing submissions, T&F reversed position again, arguing that they were entitled to more than 50% of the total attorneys' fees. (T&F Post-Tr. Br. at 74-76).

[6] Since this dispute arises in the context of T&F's right to enforce a charging lien under N.Y. Jud. Law § 475, it is considered an equitable action to which no right to a jury trial attaches. See In re Rosenman & Colin, 850 F.2d 57, 60 (2d Cir. 1988) (holding "[i]n the context of both attorneys' liens and other liens, such actions have repeatedly been regarded as equitable in nature so that no jury right attaches" and citing Damsky v. Zavatt, 289 F.3d 46, 53 (2d Cir. 1961)); see also In re King, 168 N.Y. 53, 58-59, 60 N.E. 1054, 1056 (1901) (holding that an attorney's lien is an equitable remedy); Flores v. Barricella, 123 A.D.2d 600, 506 N.Y.S.2d 885, 886 (2d Dep't 1986) (striking jury demand in suit for enforcement of attorneys' lien)

FACTUAL FINDINGS

A. The Assault

During the early morning hours of August 9, 1997, Abner Louima was assaulted by one or more police officers after he left the Club Rendez-Vous on Flatbush Avenue, in Brooklyn. (Compl.[7] ¶ 34). He was handcuffed, placed in the rear of a radio patrol car, and transported to the 70th Precinct. (Id. ¶¶ 36-37). Louima alleges that twice on the way to the precinct, the police officers stopped the car and beat him. (Id. ¶ 4). Once in the precinct station house, Louima was taken into the bathroom where he was brutally assaulted by NYPD Officer Justin Volpe,[8] who shoved a stick into Louima's rectum "with sufficient force to tear through his internal organs." (Id. ¶ 42). Despite his horrendous injuries, Louima was detained in a precinct holding cell for several hours, and eventually taken to Coney Island Hospital where he underwent surgery for his injuries. (¶¶ 63, 67).

While in Coney Island Hospital, Louima, who was then facing possible criminal charges for allegedly assaulting Officer Volpe, remained in handcuffs for several days. (L. Tr. at 58).[9] Police officers were stationed guard outside Louima's hospital room, and, according to Louima, he was "fearful for his life." (Id. at

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[7] Citations to "Compl. ¶ " refer to paragraphs in the Louimas' Third Amended Complaint.

[8] On May 25, 1999, Justin Volpe entered a plea of guilty to the assault on Louima in the bathroom of the 70th Precinct and to beating Louima in the police car on the way to the station. (Compl ¶¶ 52-53).

[9] Citations to " L. Tr. at "refer to pages in that portion of the hearing transcript of November 14, 2002 when Louima testified.

61). He was on medication during that period of time and thus he could not remember if he saw any family members during the first few days that he was hospitalized. (Id. at 59).

B. Retention of Thomas & Figeroux

On August 11, 1997, while Louima was in the hospital, in police custody, and handcuffed to his hospital bed, Jovens Moncocur, whose sister is now married to Louima's brother Jonas, contacted Brian Figeroux, Esq., who had taught a course at Brooklyn College which Jovens had attended. (M. Tr. at 128-29; F. Tr. III at 34-35).[10] Monceour asked Figeroux and Carl Thomas, Esq. to represent Louima in the criminal case that was pending against Louima at the time. (L. Tr. at 11). [11]

Brian Figeroux testified that upon receiving Moncoeur's call, he immediately attempted to meet with Louima in the hospital, but was refused admission by the police. (F. Tr. III at 35). He was forced to go to the 70th Precinct to obtain authorization to see Louima as Louima's counsel. (Id.)

Although Louima could not recall when he first met Thomas and Figeroux, Louima did remember meeting with them in the

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[10] Citations to "M. Tr. at " refer to pages in the hearing transcript of November 18, 2002 when Jovens Monceour testified. Citations to "F. Tr. III at " refer to pages in the hearing transcript of October 22, 2002 when Brian Figeroux testified. Citations to "F. Tr. I at " and "F. Tr. II at "refer to pages in the hearing transcripts of October 17 and 18, 2002, respectively, when Figeroux also testified.

[11] Louima could not recall exactly how his brother had gotten the names of Thomas and Figeroux. (L. Tr. at 54).

hospital within a few days after the incident, but he could not recall what was discussed. (L. Tr. at 57-58, 61). Louima explained that some of the lawyers contacted by his family were asking for money before they would take Louima's case; T&F was retained because the lawyers agreed to meet Louima and did not ask for money. (Id. at 55, 84-85; M. Tr. at 130). Although Louima could not recall if he signed a retainer agreement with T&F (L. Tr. at 63), Figeroux testified that Louima orally retained T&F on August 11, 1997. (F. Tr. I at 174-75).

According to Louima, he first met Casilda Roper-Simpson, Esq. at the same time that he first met Thomas and Figeroux. (L. Tr. at 14). Thomas and Figeroux told Louima that Ms. Roper-Simpson "was working with them," and Louima understood that when he retained T&F, "[t]hey were together and working as one lawyer." (Id. at 14-15). Louima testified that he did not ask Roper-Simpson to serve as his attorney, and he did not sign a separate retainer agreement with Ms. Roper-Simpson, but rather he understood that she would be paid by T&F. (Id. at 15).[12] Louima testified that he did not realize at the time that Roper-Simpson had a separate

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[12] Ms. Roper-Simpson's testimony in this regard is somewhat confusing. At first, she testified that, while she did not have a written agreement with Louima, she could not say with certainty whether she had an oral agreement with him. (See Transcript of testimony of Casilda Roper-Simpson on November 22, 2002 at 178-84). She testified that she could not "positively respond" to the question of whether "Abner Louima [ ] or Micheline Louima ever orally retained [her]." (Id. at 178). However, she then claimed during cross-examination, that she suddenly recalled that "when we left the [August 1997] press conference[,] . . . Mr. Louima expressed his appreciation for us and our involvement in the case as his attorneys and being that I as an attorney was also there, I can also make a legitimate argument that [ ] was an oral agreement [with Mr. Louima]." (Id. at 184). See discussion infra at 139-44.

office. (Id. at 77-78).

According to both Figeroux and Roper-Simpson, T&F were hired at the outset to represent Louima for purposes of both the pending criminal charges and any potential civil action. (F. Tr. III at 51-52; R.S. Tr. I at 23).[13] In support of that claim, T&F point to Sanford Rubenstein's testimony that when Rubenstein was retained during "one of the early visits" to the hospital, he was told by Louima to work with T&F on the civil case. (R. Tr. at 71).

C. Initial Contact with the Internal Affairs Division and Mike McAlary

On Sunday, August 10, 1997, prior to the retention of T&F, a nurse at Coney Island Hospital who was caring for Louima, contacted the Internal Affairs Division ("IAD") of the NYPD. (R.S. Tr. I at 163; S. Tr. I at 78, 177-78; CN&S Post-Tr. Br. at 7). On August 11, 1997, attorneys for the Brooklyn District Attorney's Office attempted to interview Louima. (R.S. Tr. I at 11, 170). According to Roper-Simpson, after approximately fifteen minutes, Louima, who was still very weak, could not respond to their questions and the interview was terminated. (Id. at 12-13). On August 12, 1997, although heavily medicated, Louima was interviewed by officers from the IAD. (L. Tr. at 96, 98; Ex. 84[14] at 1-2).

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[13] Citations to "R.S. Tr. I" refer to Roper-Simpson's testimony on November 21, 2002; "R.S. Tr. II" refers to her testimony on November 22, 2002; "R.S. Tr. III" refers to her testimony on December 2, 2002; and "R.S. Tr. IV" refers to her testimony on December 3, 2002.

[14] Unless otherwise indicated, "Ex." refers to exhibits submitted by CN&S during the fee hearing.

On that same day, August 12, 1997, Louima was also interviewed by Mike McAlary of the New York Daily News, who published an article on August 14, 1997, entitled "Victim and City Deeply Scarred." (L. Tr. at 59, 90; T&F Post-Hearing Br., Ex. 1; F. Tr. III at 38-39). T&F claim that they were instrumental in making the necessary arrangements for McAlary to gain access to Louima. (See T&F Post-Trial Br. at 8 n.7).[15]

The next day, August 13, 1997, Mayor Giuliani came to visit Louima in the hospital. (L. Tr. at 61-62; R.S. Tr. I at 65; CN&S Post-Tr. Br. at 10). According to Louima, at the urging of Louima's Uncle Nicolas, the mayor made a call from the hospital during that visit; the criminal charges were dropped, and the handcuffs were removed. (L. Tr. at 62-63). Although Figeroux and Roper-Simpson testified that they were responsible for having the charges dropped (F. Tr. III at 52; R.S. Tr. I at 32), it was Louima's testimony that T&F played no role in the decision to drop the charges despite the fact that they had been hired for the purpose of representing Louima in the criminal case. (L. Tr. at 62-63).[16]

D. Giuliani - Time Statement

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[15] According to Louima, McAlary's decision to visit Louima in the hospital had nothing to do with T&F. (L. Tr. at 90). Indeed, in a deposition of Figeroux taken on June 20, 2002, by Ronald Fischetti, Esq., who represented Officer Charles Schwarz in the criminal prosecution, Figeroux told Fischetti that McAlary had called him. (Ex. 41 at 14; F. Tr. III at 38).

[16] Figeroux testified during the deposition by Fischetti that he could not recall whether he was present when Giuliani visited Louima in the hospital. (Ex. 41 at 17).

On August 13, 1997, while Louima was still in Coney Island Hospital, a press conference was held which was attended by the Reverend Al Sharpton, members of Louima's family, Thomas, Figeroux and Roper-Simpson. (R.S. Tr. I at 16; S. Tr. I at 71;[17] F. Tr. I at 174, 179). During that press conference, which was held outside of Coney Island Hospital, Figeroux told the press that one of the officers who attacked Louima had, during the attack, said in substance, "'It's not Dinkins' time. It's Giuliani time'" (the "Giuliani time statement"). (R.S. Tr. I at 18-19; F. Tr. I at 165-72; S. Tr. I at 71).

The following day, August 14, 1997, Louima was wheeled out on his hospital bed for a press conference and repeated the Giuliani time statement. (S. Tr. at 71-72; R.S. Tr. I at 53; L. Tr. at 15253). Louima testified that he did not want to speak to the press at that time, but he acquiesced to the pressures of Thomas and Figeroux. (L. Tr. at 151-52). Roper-Simpson testified that it was Louima who "insisted" on speaking to the press to tell the world his story and that he ignored the advice of his attorneys. (R.S. Tr. I at 55-56). However, contrary to Roper-Simpson's testimony, Figeroux testified that he wanted the press conference with Louima to take place. (F. Tr. I at 182-83). He described it as a "collective decision" and indicated that the attorneys spoke to Louima before that press conference. (Id. at 183).

On August 15, 1997, the day after Louima's first press conference, Louima was moved to Brooklyn Hospital. (L. Tr. at 51; R. Tr. at 38). On that same day, his videotaped testimony was

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[17] Citations to "S. Tr. II at" refer to pages in the hearing transcript of October 17, 2002 in which Barry Scheck testified. Citations to "S. Tr. I at " refer to those pages in the hearing transcript of October 16, 2002, where Scheck also testified.

taken in the hospital for presentation to a state grand jury. (R.S. Tr. I at 50, 170; CN&S Post-Tr. Br. at 16). His testimony was then taken again for the state grand jury via videotape on August 20, 1997. (Id.)

During both the interview with IAD, the videotaped testimony before the grand jury, as well as the press conference on August 14, Louima was in a great deal of pain, on medication and clearly not in shape to make statements. (L. Tr. at 96, 98-99; R.S. Tr. I at 12-13). Many of the inconsistencies in his testimony that would later plague the prosecution's case during the criminal trials stem from statements made during these initial few public statements. (L. Tr. at 98). Louima attributed the failure of T&F to prevent him from speaking to the press as stemming from "inexperience." (Id.)

E. Initial Contacts with the U.S. Attorney's Office

During this same time period, T&F contacted the U.S. Attorney's Office for the Eastern District of New York (the "Office"), because, as T&F told Louima, they thought Louima had a "very good case." (Id. at 63-64). Thomas, who was a former Assistant District Attorney, told Louima that the State does "[not] do a good job when it comes to police brutalities" so it would be better to have the federal government get involved. (Id. at 64).

Kenneth Thompson, formerly an Assistant United States Attorney ("ASA"), who was employed in private practice at the time of the hearing, testified that he had served as an ASA for five years in the Office, and was one of the first assistants assigned to the Louima matter, along with ASA Leslie Confed., Deputy Chief

of the Civil Rights Section of the Office. (T. Tr.[18] at 210, 213-14). They were later joined on the government's team by ASA Cathy Palmer,[19] who served as the lead prosecutor until she left the Office, and by then ASA Loretta Lynch,[20] then ASA Alan Vinegar, [21]and ASA Margaret Giordano. (Id. at 214-15; V. Tr. at 236).

According to Mr. Thompson, he handled the grand jury investigation with Ms. Palmer, and drafted the indictment, as well as the government's response to the change of venue motion. (T. Tr. at 214-15). Alan Vinegar, former Interim United States Attorney, became involved in the Louima case in September 1998, first as a trial prosecutor with Ms. Lynch and Mr. Thompson, replacing ASA

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[18] Citations to "T. Tr. at " refer to pages in the transcript of testimony by Kenneth Thompson on November 22, 2002.

[19] Ms. Palmer joined the Office in 1985 and worked as a prosecutor there for approximately eleven years in total, spread out over two periods of time. (Testimony of Cathy Palmer, Esq., dated October 25, 2002 ("P. Tr.") at 3-4). At the time of the hearing, Ms. Palmer was a litigation partner at Lathami & Watkins. (Id. at 3).

[20] Ms. Lynch, who did not testify at the hearing, was subsequently appointed as the United States Attorney for the Eastern District of New York.

[21] Mr. Vinegar joined the Office in January 1990, where he was appointed Chief of Civil Rights Litigation in April 1994, Chief of General Crimes in November 1994, and Deputy Chief of the Criminal Division in August 1995. (V. Tr. at 233). He left the Office to become a partner at Wachtell and Maser, only to return to the Office as Chief of the Criminal Division in September 1998, serving in that position until August 1999 when he became Chief Assistant U.S. Attorney. In June 2001, he was appointed as Interim U.S. Attorney. (Id. at 234). At the time of his testimony, Mr. Vinegar was serving as Senior Litigation Counsel in the Office. (Id.) Citations to "V. Tr. at " refer to pages in the hearing transcript of October 17, 2002 when Alan Vinegar testified.

Giordano, and eventually replacing ASA Palmer as lead counsel. (V. Tr. at 235-36). Vinegar participated in the decision to seek and obtain additional charges against Officers Ruder, Schwarz and Wiesel for obstruction, which resulted in the second criminal trial in the case, and in the decision to indict Officers Aleman and Rosario, which resulted in the third criminal trial. (Id. at 237-38).

According to Mr. Thompson, on Monday, August 11, 1997, at approximately 8:00 p.m.,[22] Mr. Thompson received a phone call in his office from Carl Thomas, who told Thompson that he had a client who had been "raped" [23] by the police in the precinct. (T. Tr. at 218). Mr. Thompson testified that he had first met Carl Thomas while attending New York University Law School. (Id. at 215). At that time, Thompson was a year ahead of Thomas in law school, knew that Thomas was a Root Tilden scholar, had one or two classes with Thomas, and had attended a number of events at the law school arranged by Thomas. (Id. at 216-17).

During the first phone call, Thomas told Thompson that he wanted Thompson to come to his office because he wanted the United States Attorney's Office to get involved and investigate the Louima matter. (Id. at 218). At that point, Thompson had never heard of either Abner Louima or Justin Volpe. (Id. at 219). Thompson testified that originally he did not "think police officers would engage in such conduct," and he told Thomas that he did not

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[22] According to the testimony of ASA Palmer, Thompson received the call from Carl Thomas "the night before the McAlary article broke." (P. Tr. at 7).

[23] Thompson testified that he did not believe Thomas used the word "sodomized," but rather that he said raped." (T. Tr. at 218).

have the time to meet with Thomas that evening. (Id. at 218-19). When Thompson told Thomas that he could not meet with him that night, Thomas, and later Figeroux, who got on the phone with Thompson, tried to persuade Thompson to set up a meeting with Zachary Carter, then U.S. Attorney for the Eastern District of New York. (Id. at 219).

The next day, Thompson spoke to Gordon Mehler, Chief of Special Prosecutions, and Leslie Confed., Deputy Chief of the Civil Rights Unit in the Office, and although they both expressed an interest in meeting with Thomas and Figeroux, Thompson had to first get permission from Mr. Carter who was out of the office that day. (Id. at 220). During the day, Thomas and Figeroux paged Thompson to see if he had been able to set up a meeting with Mr. Carter. (Id. at 219-20). They told Thompson that Louima was "actually injured." (Id. at 221).

On the morning the McAlary article appeared on the front page of the Daily News, Thompson showed the article to the United States Attorney, Zachary Carter, and explained to Mr. Carter that he had gone to law school with Carl Thomas, the attorney representing Louima. (Id. at 222). He told Mr. Carter that Thomas had asked for a meeting to discuss the Louima situation, and thereafter, a meeting was arranged, attended by AUSAs Thompson, Confed., Gordon Mehler, and Jason Brown, as well as Thomas, Figeroux, and Ms. Roper-Simpson. (Id. at 222-23; R.S. Tr. I at 25; F. Tr. III at 41-42, 5960, 62). According to Mr. Thompson, based on the discussion at the meeting and the press report, the attorneys understood the significance of the case. (T. Tr. at 224). However, at this point in time, the District Attorney's Office was investigating the case and "the [O]ffice didn't commit to doing anything with respect to the case .....I believe [we] were committed at that time to adhere to the policy of the [Department

of Justice,] to let a state prosecution . . . play itself out." (Id. at 223-24).

According to Mr. Thompson, eventually, after conversations between Mr. Carter and Charles Hynes, the Brooklyn District Attorney,[24] a press conference was held, at which time Mr. Carter announced that there would be a joint federal-state investigation conducted into the Louima incident. (Id. at 225). Thereafter, Mr. Thompson attended a variety of meetings with Thomas, Figeroux, and Roper-Simpson, as well as Cochran, Neufeld and Scheck. (Id. at 226). Mr. Thompson testified that ASA Confed. initiated "a pattern and practice investigation," looking into NYPD statistics. (Id. at 237-38). While she was focused on that aspect of the investigation, Thompson and Palmer were focused on the "horrific thing" that happened to Louima. (Id. at 238).

Thompson expressed his view that by reaching out to federal prosecutors, Thomas "made an important contribution to [the] case," "because what they did for me . . . was it focused our attention. We had access to the lawyers representing the victim early on, and [Thomas] urged us in no uncertain terms why we should take the case from the state." (Id. at 255-56).

Mr. Thompson's testimony was largely confirmed by Ms. Palmer, who became involved in the Louima case within a week to ten days of the actual incident, even though the Office had not yet made a decision to officially take the case. (P. Tr. at 6). Ms. Palmer testified that Mr. Carter, who had already "establish[ed] a very affirmative civil rights presence," was committed to monitoring the

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[24] Mr. Thompson referred to Mr. Hynes by his nickname, "Joe."

case along with District Attorney Charles Hynes. (Id. at 6-7). According to Ms. Palmer, the call to Thompson "gave us the first heads up as to the situation" but, according to Ms. Palmer, Mr. Carter was already committed to doing civil rights investigations and, in her opinion, the U.S. Attorney's Office would have become involved even if Thomas had not contacted Mr. Thompson. (Id. at 8).

Palmer explained that Carter had indicated within a "couple of days" of the McAlary article that the Office was "going to investigate" the Louima matter. (Id. at 74). Palmer testified that "[t]he only question was whether [the Office] would affirmatively take it over from the D.A.'s office or . . . do a follow-along civil rights investigation." (Id. at 74-75). She further testified: "I can affirmatively state, both from my experience and my involvement in this investigation, that this is a case that the office was going to do. [W]ith or without a telephone call." (Id. at 11-12). She denied that Figeroux, Thomas or Roper-Simpson ever said anything to her or, to her knowledge, to anyone else in the Office that convinced the Office to prosecute the case. (Id. at 13).

F. Retention of Rubenstein

At some point, Louima's uncle, the Reverend Philius Nicolas, and Louima's cousin, Samuel Nicolas, expressed concern about the way that Thomas and Figeroux were handling the case, noting that they were "spending a lot of time with the media instead of really working the case." (L. Tr. at 12).[25] Sanford Rubenstein, Esq. had been representing another member of Louima's family and

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[25] The press later reported that there was a "rift" between two factions of the Louima family over the retention of T&F. (Exs. 27, 29).

was well known for his work in the Haitian community, so Louima's family recommended that Rubenstein be brought onto the case. (Id. at 12-13).

According to Rubenstein, on August 11, 1997, a paralegal in Rubenstein's office received a phone call from Herold Nicolas, a cousin of Louima's and the brother of Samuel Nicolas, who was a client of the Rubenstein firm. (R. Tr. at 32). Herold Nicolas asked that a lawyer from Rubenstein's firm go to see Abner Louima, who had been sodomized by a police officer. (Id. at 32). Rubenstein sent a lawyer to Coney Island Hospital, where the lawyer was told by Figeroux that they would call him if they needed him. (Id. at 33). Subsequently, on August 13, 1997, Rubenstein was asked by his client, Samuel Nicolas, to meet with Nicolas' father, the Reverend Philius Nicolas, at Pastor Nicolas' church, the Evangelique Church. (Id. at 33-34). The meeting was also attended by Dr. Jean Claude Compas. (Id. at 34). Dr. Compas, who had known Rubenstein for over 20 years and considers him to be a friend, was also a friend of Pastor Nicolas, a leader in the Haitian community. (Compas Tr. at 166-67, 170; see also R. Tr. at 31).[26] Moreover, although Dr. Compas did not know Abner Louima prior to August 9, 1997, Louima's mother and other family members are patients of the doctor. (Compas Tr. at 167).[27] According to Dr. Compas, he and Rubenstein had been working on community matters at the time

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[26] Citations to "Compas Tr. at " refer to pages in the transcript of the hearing on November 14, 2002 in which Dr. Jean Claude Compas testified

[27] The doctor testified that he has also known Roper-Simpson "fairly well" for "maybe ten years." (Compas Tr. at 166). Roper-Simpson, however, denied ever meeting Dr. Compas prior to the Louima matter, although she conceded that the doctor knew her sister and that the two are often confused with each other. (R.S. Tr. I at 131).

Louima's story was carried in the media, and they met with Pastor Nicolas to discuss a possible community response to the Louima assault and to organize a march in support of Louima. (Id. at 170-71).[28]

At the church, Rubenstein met with members of Louima's family, including Samuel and Philius Nicolas. (R. Tr. at 36). Thomas and Figeroux were also present. (Id.) Problems between Rubenstein and the T&F lawyers started almost immediately. According to Rubenstein, Figeroux called Rubenstein "a pariah," who "fed off the community," to which Rubenstein responded that he was well respected in the Haitian community. (Id. at 35). Roper-Simpson's notes[29] indicate that, at the church, Rubenstein introduced himself to Figeroux who told Rubenstein that he had never heard of him and that Rubenstein was a "??? vulture." (Ex. 84 at 6).[30] When Roper-Simpson became concerned that Figeroux was going to lose his temper, she went outside to find Thomas. (Id.) According to her notes, that was a "[b]ig mistake. [Thomas] started calling Rub[enstein] all types of names." (Id.) Inside the church office, Thomas "really lost his cool. He started yelling." (Id. at 7; see also R. Tr. at 36-37). According to Ms. Roper-Simpson, Louima's wife ultimately intervened and told Figeroux that T&F

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[28] Rubenstein testified that from time to time, Dr. Compas would refer cases to Rubenstein, but there was no money exchanged in connection with these referrals. (R. Tr. at 31).

[29] Roper-Simpson kept a diary of her initial involvement with the Louima matter beginning on August 12, 1997 and ending on September 4, 1997. (Exs. 84, 84-O)

[30] See also Exhibit 29, quoting Thomas as telling Rubenstein, "'I think you're an obsequious piece of s___. . . .You're a bloodsucker! You only pimp off our community.'"

"were only handling [c]riminal." (Ex. 84 at 7).

On August 15, 1997, Rubenstein was contacted by Samuel Nicolas and was asked to visit Louima in Brooklyn hospital. (R. Tr. at 38). At that time, Louima decided to hire Rubenstein for the purpose of representing the Louimas in the civil matter. (Id. at 39; L. Tr. at 14). Rubenstein discussed the filing of a Notice of Claim with Louima, and then contacted Mr. Rynecki, his partner at the firm, who prepared the Notice of Claim and Retainer Agreement and brought them to the hospital. (R. Tr. at 39). At that time, Louima signed the retainer agreement with Rubenstein, which bears the date August 15, 1997. (Id. at 41; L. Tr. at 66-67; Ex. 61). Rubenstein acknowledged that during one of the early visits to Louima while he was in Brooklyn Hospital, Louima told Thomas, Figeroux and Rubenstein that he wanted them to work as a team on his civil case. (R. Tr. at 71). Roper-Simpson's notes confirm that Louima told the T&F attorneys to work together with the new attorney. (Ex. 84 at 8).[31]

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[31] Roper-Simpson's law partner, Emmanuel Roy, testified that he had been told by Dr. Jean Claude Compas that Rubenstein had asked Dr. Compas "to get him into the case." (Testimony of Emmanuel Roy, November 21, 2002 ("Roy Tr.") at 114, 121). However, this testimony was objected to at the hearing, and indeed is inadmissable hearsay. In addition, Louima denied that Dr. Compas played any role in the decision to hire Rubenstein, as did Rubenstein, who denied that he sought out Dr. Compas regarding the case. (L. Tr. at 13; R. Tr. at 34). Perhaps the most important testimony in this regard came from Dr. Compas. Dr. Compas denied that Rubenstein ever asked him to get Rubenstein involved in the case, and Dr. Compas testified that he was not involved in the family's decision to retain Rubenstein. (Compas Tr. at 173-74). His testimony is corroborated by Ms. Roper-Simpson's own notes in her personal diary, which state "' Dr. Compas apparently called Rubenstein.'" (R.S. Tr. III at 23; Ex. 84). The testimony relating to the retention of Rubenstein and Rynecki is relevant to Ms. Roper-Simpson's allegations that Mr. Rubenstein violated the

G. Notices of Claim

Following his retention, on August 18, 1997, Sanford Rubenstein filed the Notice of Claim with the City of New York on the Louimas' behalf, alleging personal injuries, including psychological and emotional distress injuries, under 42 U.S.C. § 1983, and seeking damages in the amount of $50,000,000.00 for Abner Louima and $5,000,000.00 on behalf of Louima's wife for loss of services. (Ex. 3). Dated August 15, 1997, the Notice of Claim is signed by the Rubenstein firm and by the Louimas. (Id.) T&F do not appear to have signed the Notice. (Id.)

An Amended Notice of Claim, dated November 4, 1997, was later filed on behalf of the Louimas under the names of all of the attorneys, CN&S, the Rubenstein firm, and T&F. (Ex. 4). In this Amended Notice, the request for compensatory damages for both Louimas remains at $55,000,000.00, but there is an added claim of $100,000,000.00 for punitive damages. (Id. at 3).[32]

H. The March and Rally

On August 23, 1997, a rally was held at the 70th Precinct to protest what had happened to Louima. (L. Tr. at 64; R.S. Tr. I at 57). The Reverend Al Sharpton confirmed that both Thomas and

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Disciplinary Rules by the manner in which he became involved in this case. In this regard, the Court credits the testimony of Dr. Compas and Mr. Rubenstein and finds no ethical violation in the retention of the Rubenstein Firm. See discussion infra at 169-74.

[32] Rubenstein conceded that he was one of the lawyers who favored the addition of the punitive damages amount in the Amended Notice of Claim. (R. Tr. at 70)

Roper-Simpson attended rallies in connection with the Louima matter. (Sharpton Tr. at 149-50, 164). Figeroux also attended the march and testified that there were a number of marches that he and Thomas participated in during this early period. (F. Tr. III at 56-57). Louima learned about the rally through his family and the media, but he did not recall that T&F or Roper-Simpson had organized the rally. (L. Tr. at 64). He also learned of the subsequent march across the Brooklyn Bridge to City Hall involving 8,000 Haitians. (Id. at 65; R.S. Tr. I at 58-61). Roper-Simpson testified that Louima gave her a note to read in Creole to the crowd, which she did. (R.S. Tr. I at 59; Ex. KC-15). Louima did not recall giving Roper-Simpson something to read to the people at the rally nor did he recall discussing the march with T&F prior to the march taking place. (L. Tr. at 65). Instead, he recalled Mr. Rubenstein asking Louima for something to say in Creole; in response, Louima told him to say "Kimbe Le" which means "stay strong." (Id. at 65).

I. Retention of CN&S

Louima testified that the decision to retain Johnnie Cochran was precipitated by Louima's family's concern that T&F lacked the necessary experience to handle the case. (Id. at 16). King Keno, the lead singer of the band Phantom, told Louima that he had a contact, Jenny Washington, who could call Johnnie Cochran if Louima wished, so Louima told King Keno that it was "okay" to call Cochran. (Id. at 16-17). Although Louima could not recall the exact dates of his meetings with Cochran in the hospital, he did recall that he signed the retainer agreement with CN&S during his second meeting with Cochran. (Id. at 46-47). Louima also recalled that he was in Brooklyn Hospital when Cochran's name was first suggested to him. (Id. at 52).

Cochran confirmed Louima's testimony. Cochran testified

that in August 1997, he first became aware of Louima's story when he read about it in the media. (C. Tr. I at 180).[33] He subsequently received a call from Jenny Washington, the general manager of station WLIB in New York. (Id.) Although Cochran does not believe he knew Ms. Washington prior to that phone call, he did speak to her and she told Cochran that Abner Louima wanted to see him about representing Louima in this matter. (Id.) She told him that Louima wanted him to contact King Keno, the leader of the band that was playing at the Club Rendez-Vous on the night of the incident, which Cochran did. (Id. at 181). [34]

Cochran had previously met Carl Thomas during an appearance on Cochran's Court TV show, so Cochran called Thomas and told Thomas that Louima had asked to see Cochran. (Id. at 181). Cochran told Thomas that he was going to the hospital and that either Thomas or members of Thomas' team could meet him there. (Id. at 180-81). However, Cochran did not tell Thomas that Louima intended to retain Cochran, because that information had not been definitively conveyed to Cochran by King Keno. (C. Tr. II at 35, 99). According to Cochran, Thomas did not express any reservations about Cochran's visit at that time. (Id. at 182).

Thereafter, on August 23, 1997, Cochran went to Brooklyn

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[33] Citations to "C. Tr. I at " refer to pages in the hearing transcript of November 14, 2002 when Johnnie Cochran testified. Citations to "C. Tr. II at "refer to pages in the hearing transcript of November 22, 2002.

[34] Although Cochran's testimony as to what Ms. Washington said to him is clearly hearsay, no objection was raised to its admissibility at the hearing. (See C. Tr. I at 180).

Hospital for the first time.[35] (C. Tr. II at 83; C. Tr. I at 183; L. Tr. at 17). Scheck testified that he accompanied Cochran on this visit. (S. Tr. I at 27, 238).[36] Scheck confirmed that he received a call from Cochran on approximately August 23, 1997, in which Cochran stated that representatives of Louima had contacted him and he was going to be visiting Louima at the hospital. (Id. at 27). Cochran also told Scheck that he wanted Scheck to accompany him to the hospital, and that he had notified Thomas. (Id.) Although Louima was hooked up to various machines and intubated, according to Scheck, he seemed "alert and comparatively in good spirits. He seemed very happy to see us." (Id. at 28). Cochran recalled that on his first visit with Louima, there were a number of people there, including either Thomas or Figeroux or both.[37] (C.

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[35] Cochran did not recall the date of this visit, but the autographed page from the copy of his book that he gave to Roper-Simpson during that visit is dated August 23, 1997. (Ex. KC-11). Roper-Simpson also could not recall the date, but remembered it was a Saturday, which August 23, 1997 was. (R.S. Tr. I at 65-66).

[36] However, Roper-Simpson did not recall Scheck accompanying Cochran on his first visit to the hospital. (R.S. Tr. I at 67). Indeed, it is unclear whether Scheck was present during Cochran's first, or his second visit to the hospital. Cochran testified that, although he could not remember for certain, he thought that Scheck was not present during his first visit. (C. Tr. I at 183). However, Scheck recounted a conversation with Louima, involving Louima's concern that the retention of additional attorneys would increase the cost of the total attorneys' fees above one third of any eventual recovery (S. Tr. I at 28-29), which Cochran testified occurred during his first visit to the hospital. (C. Tr. I at 188-89). Louima also testified to this conversation, but he recalled it taking place during the second meeting at the hospital. (L. Tr. I at 21-22).

[37] According to Figeroux and Roper-Simpson, they were both present for the August 23, 1997 meeting but Thomas was not. (F. Tr. III at 17; R.S. Tr. I at 66-67).

Tr. II at 83). Scheck also testified that Thomas and Figeroux were both present. (S. Tr. I at 27-28). Also present at the time were several members of Louima's family, including Louima's father, his brother Jonas, and Pastor Nicolas. (C. Tr. I at 183).

Scheck testified that Cochran did most of the talking. (S. Tr. I at 28). Cochran recalled that Louima knew who Cochran was; they spoke briefly, exchanged greetings and Cochran met the other people there. (C. Tr. I at 183-84). Louima indicated that he wanted Cochran to represent him and that Cochran should work out the details with Louima's family. (Id. at 184; S. Tr. I at 28). According to Louima, Cochran responded that he did not have any problem with that if that was what Louima wanted. (L. Tr. at 18).[38] According to Cochran, none of the lawyers who was present at this meeting expressed any objection to Louima's retention of Cochran. (C. Tr. I at 188). Cochran also recalled giving Louima a copy of his book, A Journey to Justice, an autobiography, and he agreed with Roper-Simpson's testimony that photographs were taken during the first visit. (Id.; R.S. Tr. I at 71-74; Court Exs. 5-A, 5-B, 5-C; Exs. KC-8, 9, 10). According to Louima's testimony, Cochran told Louima that he was sorry about what had happened to Louima, and advised him "to stay strong." (L. Tr. at 17).

Louima also recalls receiving a copy of Cochran's book, which Cochran signed for Louima. (Id.) Louima told Cochran that he was impressed to meet him because he had only seen him on television before. (Id. at 18). Louima took Cochran's business card and said he would call Cochran back. (Id.) Louima then consulted with his family and he told them about his interest in hiring Cochran.

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[38] Roper-Simpson denies that there was any discussion of Cochran's retention by Louima during that first meeting. (R.S. Tr. I at 70)

(Id. at 19). Some family members were concerned that Cochran' prior representation of O.J. Simpson might hurt Louima with a jury, but Louima was not concerned. (Id.)

After Louima decided to hire Cochran, Cochran came to the hospital a second time. (Id. at 19-20).[39] Cochran told Louima that he would also be working with Neufeld and Scheck, and Louima approved. (Id. at 20; C. Tr. I at 193).[40] During the second meeting with Louima in the hospital, Cochran brought a copy of the retainer agreement which bears the date August 25, 1997 next to Louima's signature.[41] (C. Tr. I at 192-193; Ex. 1). Louima asked Cochran to be the lead lawyer and told Cochran that he would be working with T&F. (L. Tr. at 20-21, 25). Cochran told Louima that the lawyers could work together; "I thought I could work with anybody." (C. Tr. I at 194). Although Cochran understood at that

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[39] Louima also testified that Scheck and Neufeld were present for this meeting. (L. Tr. at 20). However, this recollection appears to be mistaken since, as set forth in note 36, supra, it is unclear whether Scheck was present, and Cochran testified that Neufeld was out of town. (C. Tr. I at 192). Indeed, Neufeld testified that he was out of the country until August 26, 1997, and that he first visited Louima on that date after learning that he, Cochran and Scheck had been retained to represent Louima. (Testimony of Peter Neufeld on October 24, 2002 "N. Tr. I " at 13-14; Citations to "N. Tr. II at " refer to pages in the hearing transcript of October 25, 2002 when Neufeld testified.)

[40] Cochran testified that he could not recall if either Thomas or Figeroux were present at the second meeting. (C. Tr. II at 92). However, Louima testified that he told Thomas and Figeroux that he had retained Cochran after the fact. (L. Tr. at 109). Indeed, Roper-Simpson testified that she was not told that Louima intended to hire CN&S until Louima gathered all the attorneys together at the hospital. (R.S. Tr. I at 76-78).

[41] Cochran testified that he was not sure if the retainer was typed on August 25, 1997, or signed on that date, or both. (C. Tr. I at 190-91, 194).

time that T&F were Louima's lawyers, Cochran did not know what role Roper-Simpson played. (Id. at 195). After speaking with Cochran, Louima told Thomas and Figeroux that he was hiring Cochran and that they should work together. (L. Tr. at 23). According to Louima, Thomas and Figeroux were not happy and they told Louima that one of their concerns was that Cochran and his partners were "not from the community." (Id. at 24).

Soon after the signing of Exhibit 1, all of the lawyers met at the hospital, at which time Louima told them to work together as one team on his behalf. (L. Tr. at 22-23, 24; C. Tr. I at 195-96; R.S. Tr. I at 76).[42] According to Cochran, he was there, along with Scheck; also present was Rubenstein, and either Thomas or Figeroux. (C. Tr. I at 196; R.S. Tr. I at 76). [43] At the meeting, Louima gave the attorneys directions to work as a team and designated Cochran lead counsel, to be in charge of the case, and "to make decisions." (L. Tr. at 24-25; C. Tr. I at 196). Cochran believed that Louima also told the lawyers that they should speak to Louima before they spoke to the press. (C. Tr. I at 197). No one objected to that instruction. (Id.) However, according to Roper-Simpson, Thomas was angry that Cochran was coming onto the case; he accused Cochran of ethical violations, and threatened to quit. (R.S. Tr. I at 80). Later, Louima learned that there had

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[42] Roper-Simpson testified that this meeting occurred on the same day as the "lap-top incident," see discussion infra at 31, which she testified took place on August 25, 1997. (R.S. Tr. I 76-80; R.S. Tr. II at 197). However, Roper-Simpson also testified that Neufeld attended the meeting at the hospital (R.S. Tr. I at 80), and Neufeld was out of the country until August 26, 1997. (N. Tr. I at 13).

[43] Roper-Simpson testified that Cochran was not present at this first meeting of the lawyers; she testified that only Thomas, Figeroux, Neufeld, Rubenstein and Scheck were there with her and Louima. (R.S. Tr. I at 76).

been an argument between the lawyers about Louima's decision to designate Cochran as the "lead" attorney, and it was subsequently decided that Thomas would be the lead attorney "for the public, the community, and everybody to know," but that any decision-making would be Cochran's responsibility and Cochran would be the lead attorney if the case went to trial. (L. Tr. at 25).

J. The Retainer Agreements

The August 25, 1997 letter of retention signed by Louima clearly states that Cochran, Neufeld and Scheck were being retained "to investigate and pursue a claim for personal injury and civil rights violations" and to represent Louima in connection with the state and federal criminal and civil rights investigations relating to this incident. The handwritten addition, initialled by Cochran, confirms that "the total attorney fees for all attorneys representing Louima shall not exceed 33 1/3%. JLC Jr." (Ex. 1).

On October 6, 1997, the attorneys entered into an "Agreement By and Between Counsel" (the "Agreement") in which it was agreed that all signatories "will jointly handle the civil matters" of the Louimas, will be "collectively . . . responsible for the preparation of all pleadings," shall provide copies of written correspondence to the others within 48 hours, and promptly report oral communications to each other. (Ex. 60). The Agreement specifies that Thomas would "have the title of lead counsel" and that "all important attorney decisions in the case will be made by consensus." (Id.) Once trial began, Cochran was to be given the title of lead counsel. (Id.)

The Agreement, which was signed by Rubenstein, Thomas

(on behalf of T&F), Cochran, Scheck and Neufeld,[44] divided the fees among counsel and contained a paragraph in which it was agreed that each of the signatories:

> assumes joint responsibility (as that term is applied in Disciplinary Rule 2-107 [A] [2]), for the representation of ABNER LOUIMA and MICHELINE LOUIMA in this matter, and that the division of fees among counsel . . . recognizes and assumes that the division of fees will not necessarily be proportional to the amount of work performed by each such signatory. Each of the signatories to this agreement, on behalf of themselves and the firms and lawyers they work with, have considered the matter of the division of fees in light of D.R. 2-107(A) of the New York Lawyer's Code of Professional Responsibility and has concluded after due deliberation, that the total fees to the signatories to this agreement in the aggregate, and to the signatories to this agreement on an individual basis, will not be unreasonable or excessive in light of factors, including those set forth in D.R. 2-106(b) of the New York Lawyer's Code of Professional Responsibility.

(Id.) Thereafter, on November 3, 1997, the Louimas executed another Retainer Agreement as to all the attorneys - - T&F, CN&S, and the Rubenstein firm - - in which it was agreed that the

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[44] In dividing up the fees, the Agreement referenced the firm of T&F but made no mention of Roper-Simpson, and her signature does not appear on the document.

total amount of legal fees, representing 33 1/3% of any total net recovery, would be divided equally, with CN&S, T&F and the Rubenstein firm each receiving "eleven (11) and one-ninth (1/9) percent." (Ex. 2). The November 3, 1997 Retainer Agreement further specified that the lawyers "will work jointly on this matter and will participate and share responsibility in the prosecution of the claim." (Id. at 2).

On September 18, 1998, after T&F had ceased to represent the Louimas, the Rubenstein firm and CN&S entered into an "Amendment to Agreement By and Between Counsel." (Ex. 5). This agreement noted that T&F were "no longer involved" in the case as of January 23, 1998 and provided that if T&F "as the result of their cessation of representation," were not to receive their 11 percent of the fees, then T&F's share would be divided as follows: (a) the Rubenstein firm would "receive eleven (11) percent of any portion of the eleven (11) percent of the gross recovery to which Thomas & Figeroux are not entitled to;" and (b) CN&S would "receive 89% of the 11% of the gross recovery to which Thomas & Figeroux are not entitled to." (Ex. 5).

K. Louima's First Meetings with the U.S. Attorney's Office

Prior to the retention of CN&S, the U.S. Attorney's Office had attempted to arrange a meeting with Louima, scheduled for August 26, 1997. (N. Tr. I at 13-14). Peter Neufeld testified that on that day, Cochran and Scheck asked him to go to the hospital to be with Louima during the interview by federal prosecutors because neither Cochran or Scheck was available to attend the meeting. (N. Tr. I at 14). Since Neufeld had been on vacation out of the country on the date of Louima's assault, he did not become involved in the case until that morning of August 26, 1997, when he went to the hospital where he met Louima and Figeroux. (Id. at

13-14).

Neufeld testified that when he arrived at the hospital, Louima was lying in a hospital bed, hooked up to an I.V. and various other devices; "[h]e appeared to be very, very tired and in a certain amount of pain." (Id. at 15). At the time, Louima was on several painkillers in addition to other medication. (Id.)

Before the government interview began, Neufeld asked Figeroux for the details of what had happened to Louima, but "Figeroux told me he was not familiar with the details. He only knew the case in broad stroke." (Id. at 14). Neufeld did not think that it was a good idea to allow Louima to speak with the government before the attorneys had debriefed their own client. (Id. at 14-15). Neufeld was also concerned that Louima had already testified before a state grand jury via videotape, explaining, "it is my experience that when you have a client or a witness who is in that kind of physical condition and psychological condition, where you know he is not going to die, that one would be prudent and wait until he is feeling better so you can interview him thoroughly and you can make sure that . . . he testifies with all of his faculties." (Id. at 16). When Neufeld voiced these concerns, Figeroux responded that it was "[t]oo late for that. We're going forward." (Id.)

Shortly thereafter, Ms. Palmer arrived with Mr. Thompson and an FBI agent. (Id. at 17). Neufeld tried unsuccessfully to have Ms. Palmer postpone the interview. (Id.) As the interview progressed, it became very clear that Louima was in pain; his answers were disjointed and at one point, one of the gauges on one of the machines signaled that he was in a danger zone, requiring the nurse to come in. (Id.) Neufeld then urged that the interview stop for fear it was exacerbating Louima's condition. (Id.)

Ms. Palmer also described her first meeting with Louima while he was still in Brooklyn Hospital. (P. Tr. at 15). She described him as "physically uncomfortable" due to his "significant injuries" and "a little reluctant" because she and Ken Thompson were from the government. (Id.) Over the next three months, after Louima was released from the hospital, Ms. Palmer, Mr. Thompson and the agents began to spend a significant amount of time with Louima and he eventually developed "a very strong relationship of trust" in the government team. (Id. at 15-16). Among other things, the AUSAs spent time with Louima at his home and, according to Ms. Palmer, both Scheck and Neufeld helped to establish a good relationship between Louima and the government which enabled the government to move its investigation forward. (Id. at 16).

By contrast, Ms. Palmer testified that based on her interactions with Figeroux, she felt that he did not trust the government or what they were trying to do. (Id. at 16-17). One example of this was Figeroux's reaction to the decision of the Office to include both FBI agents and officers from the NYPD on the investigative team. (Id. at 17-18). Figeroux, upset that NYPD officers would be involved, questioned the U.S. Attorney's commitment to a serious investigation. (Id. at 18). Figeroux was, according to Ms. Palmer, present at the first meeting in the hospital and then again during one of the first visits at Louima's house; "[b]ut other than that, [she did not] have a recollection of him being present." (Id.) Palmer testified that on several occasions, she made it clear to Figeroux that she did not think he was being helpful in getting to the bottom of who was with Louima at the Club Rendez-Vous: "He was not being helpful in building that bridge" with the family. (Id. at 79-80).

L. The "Laptop Incident"

Some time after the August 25th retainer agreement was signed, and after Neufeld had gone to the hospital with Cathy Palmer to question Louima, arrangements were made to have all of the lawyers meet to discuss how they would proceed as a team to pursue the case. (S. Tr. I at 32-33). The meeting was held in Rubenstein's office on Court Street in Brooklyn. (Id. at 33).

Thomas, Figeroux, Cochran, Scheck, and Rubenstein were present at the meeting. (S. Tr. I at 33-34).[45] Neither Scheck or Cochran could recall if Roper-Simpson was there. (Id.; C. Tr. I at 198 99).[46]According to Scheck, one of the first things that happened was that he took out his laptop computer to take notes of the meeting. (S. Tr. I at 34; C. Tr. I at 199). "Almost immediately as I did so, Mr. Figeroux became very upset and he told me to close my 'fucking laptop computer.' What are you trying to do, intimidate me with your technology?" (S. Tr. I at 34-35; Ex. 55; see also R.S. Tr. I at 83-84; R. Tr. at 43-44).[47] Thomas tried to calm Figeroux down and it was clear to Scheck that they were both "very angry." (Id. at 35). Mr. Cochran described Figeroux as "acting as if he was insane." (C. Tr. I at 198-99). "Not only were

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[45] Neufeld testified that he was uncertain as to whether he actually attended this meeting. (N. Tr. II at 265-66). Roper-Simpson testified that this initial joint meeting of attorneys took place immediately after Louima gathered the attorneys in his hospital room and instructed them to work as a team. (R.S. Tr. I at 81-85). She also testified that Cochran was not present. (Id. at 81).

[46] Cochran also testified that Mr. Rynecki may have been there. (C. Tr. I at 199).

[47] Cochran confirmed this testimony, stating that Figeroux got up, used an obscenity and slammed down the top of the computer, saying "'[a]re you trying to f'ing intimidate me by using this technology?'" (C. Tr. I at 200).

there hostile words but [Figeroux was] just trying to intimidate him with his presence." (Id. at 202).

Figeroux conceded using these statements during this incident. (F. Tr. II at 68-69). Figeroux admitted that, taken "out of context," his comments "appear[ed] to be inappropriate." (Id. at 70). However, in T&F's papers, Figeroux attempts to justify his behavior at this meeting as "readily understandable when placed in the context of Cochran's duplicity and evasion in dealing with [T&F] at this time of his entry into the case that [T&F] had worked so hard and so successfully to build." (T&F Mem. at 17).

After this initial incident, Thomas and Figeroux asked to speak privately with Cochran, telling Cochran that Scheck and Neufeld knew nothing about civil rights. (C. Tr. I at 204). When Cochran tried to dissuade them of this notion, Thomas and Figeroux accused Cochran of being "an Uncle Tom," and they argued that because they were Black like Cochran, he "should . . . favor them, and should kick Scheck and Neufeld off the team." (Id. at 204-05; S. Tr. I at 40-42). Thomas said to Cochran, "'Why are you practicing with these two Jew lawyers [referring to Neufeld and Scheck] . . . you should be working with us' - -Mr. Figeroux and Mr. Thomas - - 'because we're lawyers for the community.'" (S. Tr. I at 41). Figeroux also accused them of not caring about police brutality issues. (Id.) Cochran testified that:

> First of all, they accused me of being Uncle Tom for bringing in these Jewish lawyers. Then they referred to them other than as Jewish lawyers.

> They used a terribly pejorative term[48] They indicated I should not be working with them [referring to Neufeld and Scheck], and that they know nothing about civil rights. That these lawyers, Thomas and Figeroux, were from the community. That Scheck and Neufeld were only interested in the money.

(C. Tr. I at 204). Cochran then explained that he "had great faith" in Neufeld and Scheck, that they "were honorable people," and "some of the best lawyers that [he] knew." (Id. at 205). Figeroux stated: "We're the people that built this case. You don't care about the community. All you people are interested in is money.." (S. Tr. I at 35).

Cochran was upset by the Uncle Tom remark and he told Thomas and Figeroux that he was "black before they were even born." (C. Tr. I at 205). He then detailed his history as a lawyer and his experience with police brutality cases. (Id.; S. Tr. I at 41). He also told them that he had been trying civil rights cases before

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[48] Figeroux denied that he was "anti Jewish." (F. Tr. I at 136). He stated: "Me, I am not anti anything. What I am, you don't have to be pro something, you don't have to be anti anything. To be pro for people of color, you don't have to be anti white or anti Jewish whatever. In fact, what I think is that we need to learn from people who have succeeded. Like the Jews, they have succeeded. They have succeeded for specific reasons. If they succeed, then we can emulate that." (Id.) According to Mrs. Thomas, her husband was active in the Jewish community, serving as a member of the Board of Trustees of Kingsbrook Jewish Medical Center. (Transcript of Testimony of Elizabeth Thomas, dated December 5, 2002 ("Thomas Tr."), at 38-39). She testified that she never heard him utter anti-Semitic remarks. (Id. at 38). Mr. Thompson also testified that he never heard Thomas make anti-Semitic comments about Scheck or Neufeld nor could he recall ever hearing Thomas make such remarks about anyone. (T. Tr. at 226-27).

they even thought about going to law school and that they had never tried a civil rights case. (C. Tr. I at 205) He told them that this was a good opportunity for them to learn something and he encouraged them to do that, but he "didn't think they were going to get anywhere with their racist views and acting in this insane manner." (Id.)

Cochran told them that the important thing was what was best for Louima and the case, not the attorneys and that if it would "help a young lawyer in his community," he would agree to allow Thomas to be the community spokesperson. (Id. at 206). However, Cochran stressed that they had to clear everything with Louima. (Id.) Figeroux and Thomas told Cochran that they were from Trinidad and had a special relationship with Peter Noel at The Village Voice. (Id.) They told Cochran that they could "slip him information" and "get anything they wanted to in the press." (Id.) Cochran warned them not to do that, reminding them of Louima's instructions to clear press matters with Louima first. (Id. at 206-07). According to Cochran, they responded "negatively." (Id. at 207).

Cochran also told them it was "malpractice for them to allow Abner to go before the cameras when he is sedated, to have him be interviewed like that before the state grand jury." (Id.) He told them they did not know what they were doing and that they should "try to learn before they got this case all totally messed up." (Id.) According to Cochran, Thomas and Figeroux did not dispute any of this. (Id. at 208).

After meeting with Thomas and Figeroux separately for fifteen to twenty minutes, Cochran returned with Thomas and Figeroux to Rubenstein's office where the other lawyers were waiting and they all discussed the fact that this was about Louima and not individual personalities. (Id.) It was also agreed at this time

that Thomas would act as spokesperson to the community, and that Scheck and Figeroux would act as liaison with the U.S. Attorney's Office. (Id. at 208-09; S. Tr. I at 46; Ex. 60).

Scheck testified that an attempt was made to reach a truce and eventually everyone agreed that it was important to work as a team. (S. Tr. I at 42). They also addressed the "importance of not leaking, working in a united way, because in high profile cases dissension among a legal team . . . can create serious problems." (Id.)

They also discussed at that meeting the concept of targeting the Patrolman's Benevolent Association ("PBA") because its practices had contributed to covering up police brutality in the past. (Id.) They discussed possible Monell claims and the idea of attacking the procedures by which the PBA and the police department dealt with allegations of police brutality. (Id.) Figeroux and Thomas stated that they had not thought about these ideas, although Thomas mentioned a legislative initiative to require all police officers to live within New York City. (Id. at 43-44).

There was, at that meeting, a general agreement that attorneys' fees would be split one-third for Mr. Rubenstein, one-third for T&F, and one-third for CN&S. (Id. at 45). The attorneys also discussed the necessity of providing for Louima's security when he left the hospital. (Id.) Subsequently, a meeting was held with Ms. Palmer, Figeroux, Scheck, and Rubenstein to discuss compensation for Louima, as well as security arrangements. (Id. at 46-47).

Cochran described the relationship between CN&S and T&F as "oil and water. It was a difficult relationship from the very beginning." (C. Tr. I at 213). Cochran described Thomas as "not

only bellicose, but always threatening." (Id. at 214).[49] Between August 1997 and January 1998, Cochran attended approximately ten meetings with Thomas and Figeroux to plan strategy and divide up responsibilities. (Id. at 217-18). According to Cochran, at "almost every meeting" T&F would bring up the racial issue, contending that CN&S were interested only in money and not the underlying issues in the case. (Id. at 219).

M. The Civil Investigation

In late August 1997, the attorneys began to arrange for Louima's care and to make preparations to bring a civil action on Louima's behalf.

Neufeld described his primary role in the early part of the case as encompassing three things: (1) improving Louima's physical health; (2) improving Louima's mental condition; and (3) retaining an investigative agency to work with CN&S in investigating Louima's civil rights claims. (N. Tr. I at 1924). Given concerns about possible long-term damage to Louima's bladder and blockage to his colon, Neufeld contacted experts at Montefiore, Mt. Sinai and New York Hospitals. (Id. at 19). The lawyers were also concerned about obtaining medical testimony to disprove the claims that Louima's injuries were the result of gay sex. (S. Tr. I at

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[49] Roper-Simpson confirmed this view of Thomas, testifying that "[h]e yelled most of the time, I would say a good 60 to 70 percent of the time. That's just the way he spoke. He was a loud person. (R.S. Tr. III at 39). Thompson, however, testified that he did not consider Thomas to be "bellicose," a "yeller and a shouter," but rather described him as "outspoken He was the type of person who was very intelligent and he was a proud person and where others would probably back down, I don't think Carl would." (Id. at 227).

51).

Thomas objected to Mt. Sinai and Montefiore Hospitals, allegedly because they mainly treated white patients. (N. Tr. I at 22). In the end, it was agreed, through Neufeld's efforts, that medical experts would consult with Louima's doctors at Brooklyn Hospital. (Id. at 20). Neufeld also contacted psychiatric experts at Massachusetts General, Mt. Sinai, and Columbia Hospitals, who had experience dealing with victims of trauma and torture. (Id. at 21). They finally retained Dr. Kasimir, who was familiar with the Haitian experience and with torture victims, as a treating psychiatrist. (Id.; S. Tr. I at 51). Neufeld also worked with Dr. Kasimir during the criminal proceedings in litigating the question of defendants' access to Louima's psychiatric records. (N. Tr. I at 21-22). Neufeld also secured other experts to testify on the issue of post-traumatic stress problems. (Id. at 22). Neufeld testified that with respect to both the issue of Louima's medical and psychiatric care, he consulted with Thomas and Rubenstein. (Id. at 23).

Neufeld attributed the retention of a private investigative agency to the uncertainty of criminal convictions and the fact that there was no guarantee that the government would pursue a pattern and practice case. (Id. at 27). In particular, Neufeld was concerned with the "blue wall" of silence and the possibility that Police Department personnel would attempt to obstruct justice. (Id. at 29). His concerns stemmed from the service of summonses by the police on the owner of Club Rendez-Vous, alleging that they were running a club where there was "inappropriate sexual activity." (Id.) These summons were served at a time when claims were being made that Louima's injuries were the result of consensual homosexual activity. (Id.) In searching for an investigative agency, Neufeld interviewed three firms, and he consulted with Thomas and Rubenstein about all three. (Id. at 28). Both Thomas and Neufeld preferred the Walker

Investigative Agency, so it was the consensus of all the attorneys that the Walker firm be retained. (Id. at 28).

The Walker Agency interviewed people who were known to Louima at the Club Rendez-Vous on the night of the incident, including members of the band, the Phantoms, that was playing that night. (Id. at 30). The investigators took photographs, inside and outside the Club, as well as photographs of the route taken by the squad car on the way to the precinct. (Id. at 32). One of the things Neufeld was trying to determine was whether there were other witnesses who might have been present when the squad car stopped between the Club and the precinct, during which time Louima claimed he had been beaten by the officers. (Id. at 32-33).

Neufeld also testified that because Louima's attorneys were interested in pursuing a pattern and practice case, they wanted the Walker Agency investigators to interview other people who alleged that they had been brutalized in the same precinct. (Id. at 34). Mr. Neufeld met with Ms. Confed. of the U.S. Attorney's Office to discuss the pattern and practice investigation. (Id. at 35). At her request, Neufeld arranged a meeting with the police brutality bar to encourage lawyers who had clients claiming police abuse to come forward with their clients and describe not only what happened to them but also the response, if any, of the Civilian Complaint Review Board ("CCRB") and IAD. (Id. at 35-36). Neufeld testified that he briefed Thomas on his meetings with the police brutality bar and with Leslie Confed. (N. Tr. II at 161). Among other things, Neufeld met with the head of Civil Rights Division of the Department of Justice, who had investigated and prosecuted pattern and practice cases in other parts of the country, not only to lobby the Justice Department to proceed with an investigation into Louima's case but to discuss Neufeld's ideas about appropriate injunctive relief. (Id. at 36-37). Eventually, however, the Justice Department did not file

a pattern and practice action. (Id. at 37).

As part of the civil case before this Court, CN&S litigated and obtained authorization to take photographs inside the 70th Precinct to show that the distance between the bathroom, the sergeant's desk, the interview room and the holding cell was such that it was likely that "every single police officer" on the first floor of the precinct house knew what had happened to Louima and yet chose not to come forward. (Id. at 33). The U.S. Attorney's Office did not object to what the lawyers were doing; in fact, Neufeld testified that "[CN&S] kept them apprised of the things that we were doing of that nature." (Id. at 34).

With the authorization of Louima, Neufeld met with the New York State Legislative Black Caucus in New York near the end of September 1997 to discuss the systemic causes of the Louima tragedy and what could be done to remedy them. (Id. at 37-38). Neufeld remembered that either Thomas or Figeroux went with Neufeld to that meeting but had to leave shortly after the meeting commenced. (Id. at 168). Cochran testified that he played a role in organizing "grass roots efforts" in the Black community to support Louima, including contacting Earl Graves of Black Enterprise, Ed Lewis of Essence magazine, Mayor Dinkins, Congressman Rangel, Reverend Sharpton, and Carl McCall. (C. Tr. I at 212). Neufeld also met with the legal counsel to the N.Y. City Council, who turned over all notices of claims that had been filed with the City during the prior year alleging misconduct by police officers. (N. Tr. I at 38-39). Neufeld, working with a group of law students from Columbia University School of Law, divided these notices of claims into categories for the Monell pattern and practice case. (Id. at 38). Neufeld also met with the Counsel to the New York State Assembly to discuss possible legislation. (Id. at 39).

N. Assistance to the Government's Case

Shortly after the press reported that CN&S was joining the Louima legal team, Scheck received a call from a former student, Joanne Richardson, who was a former Kings County Assistant District Attorney, then in private practice. (S. Tr. I at 52). She told Scheck about Sonia Miller, a nurse at Coney Island Hospital, who had information relevant to the case, but who did not want to speak to the authorities. (Id.) Scheck arranged to meet with Ms. Richardson, her partner, and with Ms. Miller. (Id.) They discussed the practice of taking police brutality victims to Coney Island Hospital as opposed to other Brooklyn hospitals and Ms. Miller's role in calling Internal Affairs. (Id. at 52-53). After speaking with Ms. Miller, Scheck notified Figeroux and they arranged to have Ms. Miller meet with federal prosecutors. (Id. at 53). Ms. Palmer noted that Ms. Miller, who was one of the first nurses to see Louima in the hospital, had not previously been made available to the U.S. Attorney's Office or the District Attorney's Office. (P. Tr. at 23). Once Ms. Miller met with the government, she provided information in an interview that Ms. Palmer described as "a very significant part . . . of our initial understanding of what happened that night in the hospital." (Id.)

After Louima was released from the hospital on October 10, 1997, the government met with Louima for numerous debriefings. (S. Tr. I at 72). Although generally, it was decided that Scheck and Figeroux would be the liaison with the government during these debriefings, at some point Figeroux stopped attending. (Id. at 53-54, 72). During the first meeting in Louima's home, both Scheck and Figeroux were present along with Palmer, Thompson and an FBI agent. (Id. at 54). Prior to the arrival of the government, the attorneys had a discussion with Louima about the need to be

truthful. (Id.) During the subsequent debriefing, Palmer and Thompson asked Louima to describe, in "very comprehensive detail[,]"where and how everything had happened. (Id.) Palmer and Thompson "were pressing [Louima] very hard on certain points," and "expressing some disbelief . . . about certain details." (Id. at 54-55). During this meeting, Figeroux expressed to Scheck and to Louima some suspicions regarding why the government was pressing Louima so hard. (Id. at 55-56). Figeroux made some of these remarks in the presence of AUSAs Thompson and Palmer. (Id.)

Scheck noted that at this point in time, "there was a tremendous amount of distrust and, frankly, paranoia, among Louima, his family and friends, others in the community, and suspicion of all police officers involved in [the] investigation." (Id. at 56). There was also a "sense of tension and some distrust in terms of these debriefings" with federal prosecutors. (Id.) According to Scheck, he was trying to persuade Louima to trust the prosecutors as his allies and be as accurate and truthful as possible; Figeroux, on the other hand, expressed distrust of the government, both through his demeanor and by questioning Palmer as to why she was pushing Louima regarding certain details of his account of the night of the incident. (Id. at 56-57). However, Thompson testified that, during the fall of 1997, Thomas and Figeroux were helpful in trying to "get [the government's] investigation down the road." (T. Tr. at 235).

After the first two debriefings, Ms. Palmer spoke to Scheck and Neufeld and told them that she was suspicious of what Louima had been saying about who was with him and what had happened when Volpe was assaulted outside the night club on the night of the incident. (S. Tr. I at 58). Ms. Palmer testified that the government experienced problems with certain witnesses in the investigation of what occurred at the Club Rendez-Vous. (P. Tr. at 19). There

were a number of interviews with Louima's friends and family members regarding the events earlier in the evening prior to Louima's assault, but according to Ms. Palmer, the details "weren't hanging together. They weren't making sense." (Id. at 19-20). Louima had maintained that he was with his cousin Herold that night, but had made no mention of his cousin Yves Nicolas, also known as Jay. (S. Tr. I at 58). Palmer had interviewed Herold and several others, but she did not believe she was getting the full story. (P. Tr. at 19-20). In particular, Ms. Palmer cited the initial meetings with Herold who "was frankly, just not credible. And the more we tried to get to the bottom of it, the more stories changed, and it was very problematic." (Id. at 20). With respect to Jay, Thompson testified that the government originally did not know about his involvement on the night of the incident. (T. Tr. at 260).

Palmer asked Scheck and Neufeld to see if they could get to the bottom of the events leading up to the assault on Louima with Louima and the witnesses. (P. Tr. at 20-22; N. Tr. I at 50). Ms. Palmer explained that she had "developed what I thought was a good working relationship with Peter [Neufeld] and Barry [Scheck]." (P. Tr. at 20-21). Scheck testified that they tried to involve Figeroux in the process, but he "openly said to [Scheck] that he was suspicious and resentful that Ms. Palmer, in particular, and Mr. Thompson" were looking closely at the testimony of these cousins and that they were looking to CN&S for assistance. (S. Tr. I at 59). One of the problems Scheck identified was that Figeroux had been the first person to bring these family members to the government and now their credibility was being questioned. (Id. at 60).

Accordingly, Neufeld and Scheck spoke to these witnesses and determined that Yves was in fact the person who actually struck Volpe, not Louima. (Id. at 61). However, because Yves had

immigration problems, his relatives had asked Louima to protect him. (Id.) So Neufeld and Scheck asked a lawyer, Rick Finkelstein, to speak to Yves and eventually, Neufeld was able to get all of the witnesses to come forward with the true story. (Id.)

According to Ms. Palmer, having Yves come in and admit that it was he and not Louima who had punched Office Volpe "was an important break-through for us to start piecing together the facts of what really happened that "(P. Tr. at 22). Mr. Thompson confirmed that Yves Nicolas' admission of his involvement was "a big deal in the case" because before that the government did not know who hit Volpe. (T. Tr. at 260).

Although Thompson was not sure if it was Figeroux or Neufeld who brought in Yves Nicolas (Id. at 260-61), he testified that he recalled that both Figeroux and Neufeld played a role in getting Gregory Normil, Louima's friend, to cooperate. (Id. at 262).[50] Palmer testified that either Thomas or Figeroux first brought Normil to the government. (P. Tr. at 92). It was Thompson's view that Figeroux "endeavored, like the other attorneys, to get these witnesses to tell us the truth because we had people coming in [and] just outright lying to us." (T. Tr. at 261). According to Thompson, Figeroux was "instrumental" in keeping everyone informed of Louima's physical status and Neufeld took the lead regarding the payment of Louima's medical expenses. (Id. at 229). Ms. Palmer, however, explained that she "did not feel that Brian [Figeroux] or Carl [Thomas] assisted us. As I said, my interactions with Brian gave me the very strong sense that he was not completely trustful of

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[50] Neufeld confirmed that Figeroux was present for at least one interview with Gregory Normil, a cousin of Louima's, concerning this investigation. (N. Tr. I at 50).

our investigation. I felt that Barry and Peter and Johnnie, who I interacted with to a lesser extent, did have confidence in our ability . . . and were willing to work with us to get it done." (P. Tr. at 22).

O. The Tacopina Meetings

During the investigative phase of Louima's case, Cochran received a call from Joseph Tacopina, the lawyer representing defendant Thomas Weise, one of the police officers charged in the criminal action. (C. Tr. II at 24-25; S. Tr. I at 64). Tacopina invited Cochran to have lunch and meet with him and Russell Gioiella, Weise's other attorney. (C. Tr. II at 25; S. Tr. I at 64; N. Tr. I at 40-41). At that time, there was no discussion as to what topics would be covered at the luncheon. (C. Tr. II at 25). There were ultimately two meetings between Tacopina, Gioiella and CN&S -- one on November 20, 1997 and one on November 26, 1997. (S. Tr. I at 65; N. Tr. I at 48). The initial lunch meeting occurred at a crowded Italian restaurant in Manhattan and was attended by Tacopina, Gioiella, Cochran and Neufeld. (N. Tr. I at 41). Neufeld testified that it was only at the last minute that Cochran suggested that Neufeld come along, and according to Neufeld, the only thing that was agreed before the luncheon was that neither Cochran or Neufeld would reveal anything that had they learned from their client. (Id.) Not only did they not tell Thomas and Figeroux about the meeting, but according to Neufeld, neither Rubenstein or Scheck was told about this first meeting because "we didn't think much of it at the time." (Id. at 41-42).[51]

According to Neufeld, Tacopina did most of the talking but

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[51] Scheck, however, testified that he "had knowledge that the first meeting was going to take place." (S. Tr. I at 67).

Gioiella spoke as well. (Id.) They were trying to persuade Cochran and Neufeld that Thomas Weise, their client, "was really a good guy," that he was "in the wrong place at the wrong time," and that "perhaps others were at fault but not him." (Id.) Tacopina told them that Justin Volpe had a history of other incidents and that his supervisor had "turned a blind eye" to Volpe's behavior, information which Neufeld thought might later be useful in the civil suit against the supervisor. (Id. at 42-43). Based on Tacopina's description of what happened that night from Weise's perspective, Neufeld believed that Weise's version of events contained false exculpatory statements that might be used against Weise in the civil case. (Id. at 43). After the meeting, Neufeld prepared notes as to what had transpired. (Id. at 44; Court Ex. 1).

A few days later, Tacopina called and asked for a second meeting. (Id.) Since Cochran was out of town, Scheck and Neufeld met with Tacopina for breakfast at the Cupping Room in Soho. (Id. at 44, 46). Scheck attended the second meeting because Weise's lawyers had indicated that they had useful information about acts of police brutality involving Justin Volpe. (S. Tr. I at 66). Since Weise was a PBA delegate, Scheck thought Tacopina and Gioiella might have information that could be used in connection with Louima's civil conspiracy claim. (Id.) Even assuming that the information Weise's attorneys provided was not truthful, Scheck believed that the false information could then be used against Weise in a civil proceeding. (Id. at 66-67). According to Scheck, CN&S made it clear, as a condition of the meeting, that they were not going to say anything regarding what Louima had told them or what they knew about the case; they were just listening. (Id. at 67). They also made it clear that the meeting would not be a secret meeting; it was to be held in a public restaurant on both occasions. (Id.)

T&F contend that they were not told of the meetings with

Tacopina in "a deliberate act of exclusion," "fuel[ing] the impression that [CN&S] sought to exclude [T&F] from important decisions affecting the case." (T&F Mem. at 26; see also R.S. Tr. I at 96-98, 194-95; F. Tr. I at 138). Indeed, Scheck admitted on cross-examination that there was no effort to include Thomas or Figeroux in either the first or second Tacopina meeting. (S. Tr. I at 149-50). Rubenstein also was unaware of the Tacopina meetings until some time after the meetings had occurred. (R. Tr. at 74). On the other hand, Scheck testified that because Tacopina had appeared on Cochran's television show "many times," "it was not a big event that they were asking us to go out to lunch." (S. Tr. I at 151).

Palmer was shocked when she learned about the Tacopina meetings, [52] particularly since they occurred around the time the government was trying to elicit Weise's cooperation; "I was pretty mad." (Id. at 50). She told Scheck and Neufeld that she was upset that the government had not known about the meetings, because she thought that the meetings might have contributed to Weise's decision not to meet with the government. (Id. at 50-51). The government had been trying to get Tommy Weise to meet with them for a proffer session to see if he would cooperate, and Tacopina had already cancelled at least one proffer session prior to the meeting with CN&S. (T. Tr. at 240; P. Tr. at 50-51). Thompson testified that he "thought it was wrong that we didn't know about

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[52] Although Thompson testified that the government learned about the Tacopina meetings sometime prior to the termination of T&F's representation (T. Tr. at 267), Ms. Palmer was adamant that she did not learn of the Tacopina meetings until February or early March of 1998, after the indictment was returned, which occurred on February 26, 1998. (P. Tr. at 45, 47, 49). Scheck, however, testified that Palmer confronted him with her knowledge of the Tacopina meetings "some time in January." (S. Tr. I at 69).

these meetings, and I thought we should have been told about them." (T. Tr. at 239-40). The meetings presented problems in that the government "had to devote time to find out what was going on and what they learned about the initial contact." (Id. at 240). Thompson testified that CN&S told the prosecutors that they had decided not to tell the government because they did not want to taint the government's investigation; they were concerned about Tacopina's purpose in meeting with CN&S and they were not certain that what he was telling them was true. (Id. at 244).[53]

Mr. Thompson stated that unfortunately, CN&S' meetings with Tacopina and Gioiella "robbed [the government] of the ability or potentially did because I don't know what caused Weise not to come in, but potentially robbed us of the ability to sit Tommy Weise down and hear his statement from himself.... And to this day, I felt it was wrong." (Id. at 244-45). Mr. Thompson indicated that he did not understand why CN&S did not tell the government about the meetings without going into the substance of what was discussed. (Id. at 246). However, he indicated that he did not believe that the CN&S meeting "played a role" in the government's inability to prosecute Weise. (Id. at 250-51).

Mr. Vinegar testified that he had two reactions to the Tacopina meetings. (V. Tr. at 245). He testified that if he had known about the meetings beforehand, he would have been concerned because the government did not want anything to

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[53] Scheck explained that CN&S did not seek the government's approval prior to the meetings because if Tacopina related things that Weise had said to the authorities during his "GO-15" internal NYPD investigative hearing that might be immunized, CN&S did not want the prosecutors to learn information that would possibly taint the prosecution. (S. Tr. I at 67-68).

dissuade Wiesel from coming in to speak to the government.(Id. at 245, 271-72). He also would have been concerned if Louima's lawyers had shared information about the investigation with Tacopina. (Id.) However, given that CN&S had spoken to Tacopina, Vinegar "thought that there was potentially some strategic advantage in [the government] being able to offer or impeach Mr. Wiesel, should he testify, with the statements that his attorneys made" during the meetings, and he undertook to get a written stipulation as to what had transpired to resolve any issues of admissibility. (Id. at 245-46). There was also an issue surrounding the potential disqualification of Wiesel's attorneys if there was a dispute about what was said. (Id. at 246). Mr. Vinegar testified that he never said anything to CN&S as to whether he considered the meetings with Tacopina's lawyers to be improper. (Id. at 247). When asked if the notes taken by CN&S posed a Brady[54] problem with respect to the criminal prosecution of Officer Wiesel, Mr. Vinegar responded "no," explaining that information given to CN&S by Wiesel's attorneys was clearly information within Wiesel's attorneys' knowledge. (Id. at 276). Moreover, the account given to CN&S was "in material respects consistent with accounts" given by Wiesel to federal investigators during an earlier proffer session. (Id. at 277).

P. The Investigation of the "Giuliani Time" Statement

Another issue that plagued the government's case was the "Giuliani time" statement, first uttered by Figeroux at the press conference on August 13, 1997 and then repeated by Louima during his first press conference on the following day. (See discussion supra at 11-12). With respect to the "Giuliani time"

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[54] See Brady v. Maryland, 373 U.S. 83 (1963).

statement, Ms. Palmer expressed her view that when she first heard about the statement, she thought "it was an incendiary statement in terms of not just the prosecution, frankly, but . . . for the City of New York," and therefore, it was important to determine the genesis of the statement." (P. Tr. at 24).[55] During the first interview with Louima in the hospital, Ms. Palmer "became convinced that the Giuliani [time] statement had never been made." (Id. at 26).

Later, toward the end of November or early December of 1997, during a walk through of the events of that evening, Louima told the government, "without any prompting," that the Giuliani time statement was untrue. (Id. at 105-107; S. Tr. I at 73). Palmer then called Scheck and told him that Louima had told the federal prosecutors that the "Giuliani time" statement had never been made and that the government was suspending the grand jury presentation until this issue could be straightened out. (S. Tr. I at 73).

Vinegar participated in the investigation into the Giuliani time statement. (V. Tr. at 238-40). Since Louima made the statement not only to federal agents and prosecutors, but under oath in one of the state grand jury sessions, it created "significant concern[s]" about Louima's credibility at trial. (Id. at 240). Ms. Palmer asked Scheck to investigate this and get to the bottom of how the "Giuliani time" statement first arose. (S. Tr. I at 74). According to Scheck, Palmer wanted Scheck "alone to do this" and "[s]he wanted me to do it carefully, obviously without any leaks." (Id.) Palmer indicated that she did not ask T&F to investigate the Giuliani time statement because she "had a concern as to whether Mr. Figeroux had had

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[55] At the time, there was a mayoral race in which Mayor Giuliani was running against, among others, Reverend Sharpton and Ruth Messinger. (S. Tr. I at 71).

any involvement in the statement initially being made," and she did not feel that T&F had been "helpful in building the kind of trust working with [the government]." (P. Tr. at 42).

T&F assert that because Figeroux was under suspicion for having originated the Giuliani time remark, Scheck "conduct[ed] his investigation in an accusatory manner . . . and encouraged Louima to blame" Figeroux even after the investigation confirmed that the statement originated from others. (T&F Post Hearing Br. at 31). T&F further contend that CN&S failed to take steps to prevent Louima's family members from making statements designed to shift the blame back onto Figeroux even after the truth was known and T&F had left the case. (Id. at 32 (citing S. Tr. I at 76-81)).

These accusations are belied by the credible evidence which demonstrates that Scheck conducted the investigation in a deliberate and non-biased fashion. Indeed, upon being asked by Palmer to investigate the genesis of the Giuliani time statements, Scheck first performed a Lexis-Nexis search of every article written about the Louima case in an effort to determine who first said anything regarding the "Giuliani time" statement. (S. Tr. I at 76). Articles in the Daily News and Newsday first attributed the statement to Brian Figeroux at the August 13, 1997 press conference in front of Coney Island Hospital. (Id.) Scheck also spoke to Louima, who told Scheck that while Louima was in the hospital, either late on August 13 or early in the morning on August 14, he spoke to a man, later determined to be Jean-Claude Laurent, a relative of Magalie Laurent, one of the nurses taking care of Louima. (Id. at 74-75). Scheck learned that Laurent had spoken to Louima in Creole and told Louima that he had to make a statement that his attacker had said, "'It's not Dinkins time. It's Giuliani time,'" because this would be important to bring attention to [Louima's] case." (Id. at 75). Louima then went out on August

14 at the press conference, where he was "in terrible pain, . . .[and] on drugs," and he made the statement. (Id.) Louima did not really know Laurent very well, but he told Scheck that Louima's brother Jonas might have more information. (Id.)[56]

Scheck, at Louima's suggestion, then met with Louima's brother Jonas at Junior's restaurant in Brooklyn. (Id. at 76). Jonas told Scheck that Jean-Claude Laurent and his brother, Andre Laurent, or "Tefrey" as they called him, were auxiliary policemen and had given advice to Louima's family on how to file a complaint with the Civilian Complaint Review Board. (Id. at 76-77). Jonas mentioned that he had attended a meeting with Figeroux at the Laurents' home in Brooklyn where they had discussed strategy. (Id. at 77). Finally, Jonas admitted that, prior to the August 13 press conference, Tefrey had given Jonas a note to give to Figeroux that contained the statement, "'It's not Dinkins time. Its Giuliani time,'" because Tefrey felt that this would be important to call attention to the case. (Id.) Jonas then gave the note to Figeroux who made the announcement at the press conference. (Id.)

Scheck then met with the Laurents and they confirmed Jonas' description of their early role in the genesis of this statement. (Id. at 78). Although they defended the "Giuliani time" statement, neither Jean-Claude Laurent nor Andre Laurent was willing to go so far as to admit that he had suggested that statement to Louima. (Id. at 78-79). After a second meeting with the Laurents, also attended by Cochran, Scheck tried to arrange a meeting with Figeroux. (Id. at 80). Scheck testified that maybe two or three days

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[56] During this portion of his testimony, Scheck related conversations involving Louima. There were no objections raised to the admission of this testimony.

passed between the time he learned that Figeroux was the first person to publicly make the "Giuliani time" statement and the time that he confronted Figeroux. (Id. at 152-53). When Scheck questioned Figeroux about the statement, Figeroux claimed to know nothing about Louima's conversation with Jean Claude Laurent on the morning of August 14, 1997, but Figeroux did tell Scheck that he had seen Laurent at the hospital on August 14. (Id. at 81). At the meeting, Scheck showed Figeroux the newspaper articles, and explained that Figeroux was the first one to say anything about the "Giuliani time" statement. (Id. at 80).

According to Figeroux's testimony during the fee hearings, Jonas Louima, Abner's brother, handed Figeroux a note during the press conference which Figeroux opened and read to the press. (F. Tr. I at 165).[57] Although Figeroux had never heard Louima mention this remark in any of his prior conversations, Figeroux decided it must be true and revealed it to the press without confirming it with Louima. (F. Tr. I at 172-3; R.S. Tr. I at 19). Figeroux conceded that the note had been thrown away and that Figeroux had "assum[ed]" that Jonas had written it. (F. Tr. I at 169-70). Figeroux also conceded that he had spoken to Louima on three or more occasions prior to the press conference, and that even though Louima had never said anything about the Giuliani time statement during those conversations, Figeroux did not question Jonas about the note because Figeroux "didn't have the opportunity at that time to speak to anyone" and because he believed it to be true. (Id. at 172-73, 176).

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[57] This testimony by Figeroux contradicts his prior statement given during the course of an FBI interview on April 18, 2002 in which he told the FBI that "[t]here was nothing about 'Giuliani time' on the note" but rather, "Jonas spoke to Figeroux and told Figeroux about the 'Giuliani time' statement." (Ex. 44).

It is unclear whether Louima ever confirmed the Giuliani time statement to Figeroux. Figeroux's own version of events varied. At one point during his testimony, Figeroux stated that he could not remember if the Giuliani time statement was discussed with Louima before the press conference. (Id. at 184-85). However, he changed his testimony later to say that he could not "remember exactly what was said but I know it was discussed, and he did confirm that, yes, that statement is true." (Id. at 187).

Figeroux then testified that Louima had told him in the presence of Thomas and Roper-Simpson that the remark was true. (Id.) In a subsequent interview with the FBI, he indicated that he was "almost 100% certain" that Louima had confirmed the statement in Thomas' and Roper-Simpson's presence on the day before the August 14th press conference, although he was unsure whether Thomas and Roper-Simpson had heard the conversation. (Ex. 44 at 1-2).

This testimony by Figeroux was contradicted by the testimony of both Louima and Roper-Simpson. Louima testified that he did not recall discussing the Giuliani time statement with Figeroux prior to the August 14th press conference (L. Tr. at 152), and Roper-Simpson's testimony was that Figeroux was not even in the hospital room with Louima prior to Louima's press conference. (R.S. Tr. IV at 6-9). According to Roper-Simpson, she and Thomas were the only ones in the room with Louima and she has no recollection of Figeroux ever discussing the Giuliani time statement with Louima.[58] (Id.)

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[58] Indeed, she told the FBI that she had never discussed this statement with Louima. (Ex. 45 at 5).

When asked, Figeroux denied considering the political ramifications of the Giuliani time statement, but acknowledged that he knew it would generate a lot of publicity. (F. Tr. I at 167-68). He testified that "[a]t that time we had the opportunity of having the Reverend Al Sharpton and various political leaders there talking about our client being victimized," and therefore Figeroux thought it was an opportune moment to disclose the statement to the press. (Id. at 165). Figeroux also testified that he understood that ultimately Louima's credibility would be evaluated against the credibility of the police officers, and that therefore it was important to maintain consistency in Louima's statements. (Id. at 16364). Figeroux stated that, "[i]n a million years[,] I would never believe that that statement was false. If I [had] thought it was false, I would not have proffered it." (Id. at 166). Figeroux thought that since Jonas was there on the night of the incident and had had discussions with Abner, the statement must be truthful. (Id.)

Scheck testified that during his investigation, he also tried to speak to Thomas about the issue but Thomas would not speak to Scheck until sometime during the week between Christmas and New Years, when Scheck finally met with Thomas at Thomas' offices in Brooklyn. (S. Tr. I at 84). Scheck testified that the statement had an "enormous detrimental effect on both the civil and criminal case, because it was considered by many a blood liable of a kind." (Id. at 156). "[I]t undermined obviously the credibility that Louima would have at the criminal trial. And I think it undermined the force of our civil case." (Id.) Scheck subsequently reported to Cathy Palmer and Ken Thompson what he had learned about the Laurents and then the government's debriefing sessions began again with Louima.(Id. at 89).

Q. Statements to the Press

(1) Louima's Initial Instructions

Although Louima acknowledged the benefits of publicity in bringing his case to the attention of the public (L. Tr. at 130),[59] early on, Louima told all the lawyers, including T&F, that he did not want them making statements to the press without his approval. (Id. at 26; C. Tr. I at 197). Louima testified that he had several discussions with the lawyers about press statements and team work. (L. Tr. at 2728). According to Louima, he told the lawyers at the first meeting with CN&S in late August 1997 that Cochran would be "the one who will deal with the press." (Id. at 26). Cochran testified that, at this meeting, Louima instructed all of the attorneys to clear all statements to the press with Louima beforehand, and designated Cochran as lead counsel.[60] (C. Tr. I at 197-98; see also R. Tr. at 45).[61] This comports with Cochran's testimony that the press

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[59] In addition to the interview with McAlary, and Louima's statements to the press from his hospital bed, on August 14, 1997, Thomas and Figeroux appeared on 20/20 with Ted Koppel, and, along with Roper-Simpson, they also appeared on the Gabe Pressman Sunday Morning Show. (R.S. Tr. I at 49). According to Roper-Simpson, "[t]here was a lot of time devoted to the press," particularly by Thomas and Figeroux. (R.S. Tr. I at 50).

[60] Later, it was agreed that Thomas would be the "lead" attorney as far as the public was concerned but Cochran would still be in charge of decision-making. (L. Tr. at 25). However, Louima also instructed the attorneys to clear press matters with him. (Id. at 26-27).

[61] T&F argues that Louima's testimony in this regard is "muddled," pointing to Louima's testimony on cross-examination that in January 1998, he instructed the attorneys not to speak to the press without prior clearance (L. Tr. at 118), and his later testimony that he issued this instruction in response to a Village Voice article dated September 2, 1997. (Id. at 130-31; Ex. 29). This article was published approximately one week prior to that date. (S. Tr. I at 90). However, while Louima's recollection of the chronology of his

instruction was discussed among counsel during the meeting at which the "laptop incident" occurred. (C. Tr. I at 206-07).

Neufeld testified that during the six or seven months prior to the withdrawal of T&F, Louima repeatedly reminded the lawyers he did not want them speaking to the press. (N. Tr. II at 169-70). According to Neufeld, by September 1997, the press was writing stories critical of Louima's family and that "early on," Louima advised the lawyers not to speak to the press unless they cleared it with Louima first. (Id. at 170-72). Neufeld explained that after reading certain articles, Louima complained about T&F's statements to the press. (Id. at 174). Neufeld denied that he ever "prompted" Louima to complain about the stories in the press (id. at 175); Neufeld maintained that Louima "expressed that position to us." (Id. at 173).

Louima testified that while there were times when Rubenstein, Neufeld, Scheck and Cochran would ask for approval from Louima to speak to the press,[62] Figeroux and Thomas never asked for Louima's approval. (L. Tr. at 27). Problems developed because Figeroux and Thomas were not working as a team with the others; according to Louima, they were "bad mouthing" Cochran, Neufeld and Scheck, "for a long time," even after they resigned. (Id. at 28, 30). Among other things, Louima testified that they used "some ethnic word like a negative word that you use against a

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instructions was vague, it appears that, rather than contradicting himself, Louima may have been referring to distinct occasions on which he instructed the attorneys regarding their contacts with the media. (L. Tr. 111-19, 130-31).

[62] Rubenstein testified that he obtained Louima's permission before speaking to Vanity Fair. (R. Tr. at 45; Ex. 27).

Jewish person." (Id. at 29). Louima told Figeroux and Thomas "not to do it." (Id.)

Ms. Palmer was also concerned about stories appearing in The Village Voice in the late fall of 1997 in which Thomas and Figeroux were being referenced as the sources of the stories. (P. Tr. at 29). She testified: "To me, this case was problematic enough, given the spotlight on [the case] Having it play out in the press . . . was not helpful." (Id.) Mr. Vinegar also indicated that he preferred there to be as little discussion as possible about the case in the press prior to and during the criminal trials. (V. Tr. at 242). Vinegar stated that Neufeld and Scheck would usually contact him before responding to press inquiries. (Id. at 242-43).

(2) Specific Examples of Alleged T&F Leaks

During the fee hearing, CN&S introduced a number of press clippings that they argued demonstrated T&F's continuous unauthorized leaks to the media regarding Louima's case. In each of these articles, either Thomas or Figeroux is quoted as making comments about the case that were neither designed to publicize the tragedy nor promote their client's interests. Rather, the comments appear to be critical of the client's family, the other lawyers, or designed to promote their own interests.

For example, an article appeared in the September 2, 1997 edition of The Village Voice that recounted rifts between factions of the Louima family and the various attorneys. (Ex. 29). The article stated that T&F were "engaged in a struggle with members of the more conservative side" of the family. (Id.) The article relied on a "source close to Louima's lawyers" (id.), and stated that the wealthier branch of Louima' family had "reportedly turned the case over to a white lawyer." (Id.) The article went on to state that T&F

were "deliberate[ly]" excluded from an August 12, 1997 meeting between Mayor Giuliani and the Louima family. (Id.) The article also recounted a contentious first meeting between T&F and Rubenstein, quoting an "insider" as stating that Thomas called Rubenstein an "'obsequious piece of s__'" and a "'bloodsucker.'" (Id.)

On November 9, 1997, an article appeared in The New York Times questioning the need for CN&S' involvement in the Louima case. The article states: "One member of the original Louima team suggested that Haitian immigrant leaders had pushed for Mr. Cochran because they feared that some of the original lawyers were not up to the job." (Ex. 30). The article quotes Thomas as follows: "'There was a feeling that our lack of experience was such that we would not be able to handle the case to the conclusion We feel we're capable.'" (Id.). The article cited Thomas as stating that "he thought the decision to bring in Mr. Cochran reflected a lack of confidence in him and his two associates, not by the Louima family but by people in the 'Haitian and African-American and other communities.'" (N. Tr. I at 100 (quoting Ex. 30)). Neufeld testified that when Louima saw the article, he "expressed his displeasure with Mr. Thomas's and Mr. Figeroux's comments to the press, saying that they created disunity as opposed to helping him with his lawsuit." (N. Tr. I at 101). When asked about the statements in this article, Figeroux testified that he had spoken to Joseph Fried from The New York Times, but he could not recall whether he made any of the statements cited in the November 9, 1997 New York Times article. (F. Tr. I at 222-24).

In the December 1997 issue of Vanity Fair, there appears a lengthy article by Marie Brenner, entitled "N.Y.P.D. Blue, Inside the Police Brutality Case that Shocked the Nation." (Ex. 27). In this

article, Figeroux is quoted as saying:

> "There are two sides of the family in this case," Figeroux told me. "The poor side is for political change - that's Abner and Micheline. But they have no real power. And then there is the rich side: Pastor Nicolas and Samuel."

(Id. at 330). Later, in the same article, Figeroux is quoted as saying: "'It is all about money where this family is concerned It's a diseased family as far as his [Louima's] family goes.'" (Id. at 334). According to the article, when Figeroux originally arrived at the hospital to meet Louima for the first time, "there was already 'a bloodsucker' from a personal injury law firm 'They weren't even concerned with the guy's safety,' Figeroux stated." (Ex. 27 at 330; F. Tr. I at 195). When asked during the fee proceeding who the "bloodsucker" was that he was referring to, Figeroux did not directly answer the question. Instead, he responded: "Mr. Rubenstein had an agreement with Ms. Brenner. Apparently, Mr. Rubenstein wanted to write a book." (F. Tr. I at 196).[63] Ultimately, when questioned further, Figeroux admitted that the person he was referring to was an attorney from Rubenstein's firm. (Id. at 200). He did not deny making the statement; he simply testified that he could not recall if he made that statement to Ms. Brenner, but he knew that both he and Thomas had uttered "that statement 'bloodsucker.'" (Id. at 196-97).

Figeroux conceded that he did not have an "oral or written agreement from Mr. Louima to speak to anyone in the media," in connection with this article. (Id. at 197). Instead, he claimed that at

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[63] Marie Brenner is the author of the Vanity Fair article.

that time, December 1997, he was just trying to get Louima's story out. (Id.) When asked if he told the author of the article that "Abner has no power," he testified that he could not recall. (Id. at 206). Nor could he recall whether he discussed Louima's uncle's influence over Louima with the reporter. (Id.) In essence, when questioned about specific statements attributed to him by the author of the article, Figeroux did not deny making any of those statements, consistently responding, "I don't recall." (Id. at 207-210).

According to Neufeld, he had discussions with Louima about a number of these articles, indicating that Louima was "distressed" that T&F were discussing "the inner-workings of his legal team" with the press. (N. Tr. I at 103). At some point, Louima stopped reading the articles in part because the prosecutors had instructed him not to read them, and because "he really had just run tired of the whole thing in the press." (Id.)

(3) Louima's Retraction of "Giuliani Time"

In the January 20, 1998, edition of The Village Voice, Peter Noel printed an article revealing for the first time that Louima, "[a]ccording to sources," had not told the truth and was retracting his statement about "Giuliani time." (Ex. 53). The article quotes "[a] federal investigator" as its source. (Id.) The Village Voice article, although dated January 20, 1998, hit the newsstands sometime around January 12 through 14, 1998. (S. Tr. I at 90).

On January 15, 1998, The New York Times also printed an article revealing that Louima had retracted the "Giuliani time" statement. (Ex. 36). Marvyn Kornberg, Esq., lawyer for Justin Volpe, was quoted in the article as noting that "'[i]f he [Louima] would lie about that, what would he say to collect $450 million,

which is what he is suing for?'" (Id.)[64]

According to Scheck, he, Neufeld, Cochran and Rubenstein, were "very upset and angry" that the story broke this way, as was Louima. (S. Tr. I at 90). Scheck also testified that Cathy Palmer was "livid, extremely angry." (Id.) She was extremely angry because The Village Voice article indicated that Louima had only revealed the truth after extensive interrogation, which according to Palmer was not true. (P. Tr. at 29-30). Instead, Louima had voluntarily come to the government and revealed this information. (Id. at 29-30, 106-07). Palmer noted that at the time the article was released, the case had not been indicted and the government was concerned that it would seriously damage Louima's credibility. (Id. at 30).

Both CN&S and the government were concerned that either Thomas or Figeroux had been the source of the The Village Voice article because CN&S believed that either Thomas or Figeroux or both had a relationship with Noel. (S. Tr. I at 91-92; P. Tr. at 30, 37). A number of prior articles written by Noel had quoted Thomas and Figeroux. (Id.) Indeed, Ms. Thomas testified that her husband knew Noel (Thomas Tr. at 77), and that he spoke to Noel about the Louima matter. (Id. at 78). Figeroux also admitted knowing Peter Noel for at least six years and had spoken with him ten to twenty times. (F. Tr. I at 219). He claimed, however, that he does not read The Village Voice. (Id. at 220).

Palmer testified that she believed that either Thomas or Figeroux was responsible for leaking the retraction of the Giuliani

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[64] See also Ex. 37 (Newsday article dated January 18, 1998 by Jimmy Breslin discussing the retraction.)

time statement and that having the story leaked prevented the government from "mak[ing] good use of the fact that [Louima] had [voluntarily] come forward" and recanted his statement. (P. Tr. at 30, 37). Indeed, when asked about the Tacopina meetings, Palmer made it very clear that while she was angry about the Tacopina meetings, The Village Voice article in January "was potentially devastating with respect to the impact it had on Abner's credibility." (Id. at 65).

Another article by Mr. Noel was subsequently printed in The Village Voice, which although dated January 27, 1998, was on the newstands around January 21, 1998. (N. Tr. I at 103-04; Ex. 34). This article described in part the investigation conducted by Scheck into the "Giuliani time" statement. (Id. at 94; Ex. 34). Although this article quoted Thomas and Figeroux as declining comment (Ex. 34), Louima was again upset and reprimanded Thomas and Figeroux. (L. Tr. at 36-40). T&F contend that not only is there nothing in the article to suggest that they were the source, but the article specifically refers to a "law enforcement insider." (T&F's Post-Hearing Br. at 37).

R. The Withdrawal of T&F

Louima testified that during the summer, fall and winter of 1997, Louima read certain things about the case in the press that upset him. (L. Tr. at 31). Specifically, there were articles quoting Figeroux at times when Louima had not authorized the release of that information. (Id. at 31-32).[65] Among others referred to by

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[65] When asked if he was upset at Thomas as well, Louima replied that he didn't specifically recall any leaks involving Thomas. (L. Tr. at 31-32).

Louima was the January 20, 1998 article in The Village Voice, which quoted Figeroux and discussed the "Giuliani-time" remark. (Id. at 32, Ex. 53). According to Scheck, after that article came out, Louima was "angry at Brian and Carl because he thought they might be the source of this article." (S. Tr. I at 93). Neufeld also testified that "Louima said that he believed that Carl Thomas and Brian Figeroux were the source of the leaks, that he was well aware of the long relationship they had with Peter Noel." (N. Tr. I at 94). Moreover, Louima was concerned that the article reported that Louima had first uttered the Giuliani time statement to his brother Jonas - information attributed in the article to Brian Figeroux. (Id. at 94-95). Louima was concerned because this "was a statement that had never been in the press any place, that no one had ever uttered publicly." (Id. at 94).

When Louima saw the article, he went "straight to Figeroux's office" and asked him why Figeroux's name was mentioned in the article. (L. Tr. at 33). Figeroux responded that he didn't know anything about it, to which Louima said, "'[w]hy don't you pick up the phone and call the newspaper and tell them, ask them why they put your name if you are not the source of the article.'" (Id. at 33). According to Louima, Figeroux denied being the source but told Louima that he did not want to make the call. (Id. at 34). Louima testified that he was "so upset I slammed the newspaper on [Figeroux's] desk, and I walked away." (Id.)

Louima then called a meeting with all the lawyers that afternoon at Rubenstein's office. (Id.; R. Tr. at 51). Most of the lawyers were there except Cochran. (L. Tr. at 34-35). At the meeting, Louima was angry and he instructed the attorneys that it was not acceptable for them to make comments to the media without Louima's approval. (Id. at 35; S. Tr. I at 90). According to Rubenstein, Louima specifically said to Figeroux, "'our name is in

this article. I want the leaks stopped.'" (R. Tr. at 52). Although Figeroux denied leaking anything, Louima stated that if the problem continued, he would "fire all of them." (Id.; L. Tr. at 35). The lawyers all agreed that it would not happen again, and that they would work as a team and follow Louima's instructions. (L. Tr. at 36).

During the course of the proceedings, the Estate of Mr. Thomas called the Reverand Al Sharpton as a witness. Reverand Sharpton testified that prior to the time of Martin Luther King' birthday, on or about January 15, 1998, Sharpton had a conversation with Thomas in which Thomas indicated that he wanted to quit the Louima case because Abner Louima was angry about the press leaks. (Sharpton Tr. at 172-73). Sharpton persuaded Thomas not to quit because he felt that this was "not the way to handle it," and "it would not be good for what we are trying to do." (Id. at 172). When asked on redirect examination whether what "Mr. Thomas was upset about was his view that the lawyers of [CN&S] had been turning Abner Louima against him," Mr. Sharpton responded, "No. The conversation I had with him was. . . about his feud with Abner." (Id. at 174). Sharpton categorically denied that Thomas had ever "expressed to [Sharpton] his view that he was being marginalized by [the other] attorneys," adding that "I don't think anybody could marginalize Carl Thomas." (Id. at 175).

Approximately one week later, when the second article appeared in The Village Voice, Louima called a second meeting of the attorneys. (L. Tr. at 36; Ex. 34). This time the meeting took place in the afternoon of January 23, 1998 at CN&S's offices at 99

Hudson Street in Manhattan. (L. Tr. at 36-37; R. Tr. at 52).[66] Previously, a decision had been made that Jonas Louima would speak to some FBI agents about what he had told Scheck about the Giuliani time statement and that meeting was scheduled to occur at 99 Hudson Street. (S. Tr. I at 96-97). Louima was in Cochran's office and the Laurents were in the conference room. (Id. at 97-98). An attempt was made to persuade the Laurents to confirm the origins of the Giuliani time statement to the FBI, but the Laurents would not commit to confirming what Jonas Louima had said about the origin of the Giuliani time statement. (Id. at 97). Eventually, they left. (Id. at 98).

At some point, however, Thomas, Figeroux, and possibly Roper-Simpson, arrived and thereafter, Louima held a meeting with them and with the CN&S attorneys. (Id.; R.S. Tr. I at 126-27; N. Tr. I at 106-07). All of the attorneys were there except for Rubenstein, who arrived later. (L. Tr. at 37; R. Tr. at 53). Louima told the lawyers that things were "getting out of control," that "[w]hat they [were] doing is hurting the case instead of helping the case," and that the media was printing stories about a fight among the lawyers. (L. Tr. at 38-39). According to Scheck, Louima complained that he did not think that Thomas and Figeroux were cooperating with CN&S and he urged them to cooperate in the Giuliani time investigation. (S. Tr. I at 99). Thomas objected, stating that he thought Scheck's investigation was an effort "to set up or harm" Figeroux, and Figeroux joined in what Scheck described as a "heated" protest. (Id. at 100). Scheck tried to reassure them that if the Laurents, Louima, Thomas and Figeroux were consistent in

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[66] Although all of the other witnesses testified that this January 23, 1997 meeting occurred at CN&S' offices at 99 Hudson Street, Roper-Simpson testifed that she was "150 percent" sure that the meeting had been at Rubenstein's office. (R.S. Tr. III at 139).

their stories, Figeroux would not be a target for subornation of perjury charges even though Scheck believed that what Figeroux had done, in making the statement to the press without first confirming it with Louima, "was incredibly - - it was a ridiculous thing to do from the point of view of a lawyer." (Id.)

According to Scheck, Louima was particularly angry at Figeroux and Thomas about the press leaks and he said that nobody should speak to the press until he had approved the statement. (S. Tr. I at 99). Louima testified that he was very upset about the January 27, 1998 Village Voice article because this article quoted both Thomas and Figeroux after Louima had explicitly said that he would fire them if they did not follow his instructions not to speak to the press. (L. Tr. at 37). According to Louima, Thomas and Figeroux indicated that they were not willing to follow his instructions. (Id. at 39).

Thereafter, Louima met separately with Figeroux, Thomas and Roper-Simpson in Cochran's office. (L. Tr. at 39; S. Tr. I at 101-02). Scheck went to the conference room, and Neufeld went back to his office. (S. Tr. I at 101). In private, Louima told T&F and Roper-Simpson that he "was very angry at them, and I [told] them I respect them because they were the first one[s] who [got] involved with the case. But they are hurting the case. [And] I [told] them prior that if that happened again, I am going to fire them. So that is their last chance. That if anything happens again, I am not even going to call them in. I am just going to fire them." (L. Tr. at 39-40).[67]

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[67] Roper-Simpson testified that what Louima said was: "'Well, last week you had offered your resignation and I'm willing to accept your resignation today if you still want to give it or I have to let you go.' And then I was in shock, I looked at Brian and then I looked at Carl and Carl

According to Louima, Thomas responded by stating that "they want to quit." (Id. at 40). Neither Figeroux or Roper-Simpson said anything to disagree with Thomas. (Id. at 41). Louima then left the room to tell the other lawyers what had been said. (Id.) Cochran said that the resignation would be a publicity problem but they would have to deal with it. (Id. at 41-42). Louima then went back to Cochran's office where he told Figeroux, Thomas and Roper-Simpson that their decision was "fine with me," at which point they just "walked out on their own." (Id. at 42).

Scheck testified that after speaking with Louima, "they [Thomas and Figeroux] came out and really were stomping out of the office and I heard Mr. Thomas say 'we resign. We are resigning.'" (S. Tr. I at 102). Scheck then went back into Cochran's office and Louima told Scheck, "they quit and he [Louima] was as shocked as I was." (Id. at 102). According to Scheck, after he heard Thomas state that they were quitting or resigning, he did not hear or see Figeroux do anything to express disagreement with what Thomas had said. (Id. at 103).[68] Although

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seemed a little astonished and Carl said, like he went 'okay' and we left." (R.S. Tr. I at 128). Figeroux testified that Rubenstein had earlier said to him "'listen Brian, all you have to do is stay on this case, you do nothing. You collect your money at the end of the case and move on. Do nothing, collect your money. It's either that or you quit, you'll be fired.'" (F. Tr. III at 21).

[68] Ms. Thomas was asked a series of questions about her husband's behavior and demeanor around the time of this meeting. She stated that although her husband was originally "very excited" and enthusiastic about the case (Thomas Tr. at 44), he "became very troubled. He went from being very enthusiastic . . . and putting all of his energy [into the case] which he continued right until he came off. But he became increasingly troubled in his interactions with the new team, Mr. Cochran and his team." (Id. at 47). Ms. Thomas testified that, prior to attending this meeting in January, Mr. Thomas stated that he "thought [t]hat he was going

Neufeld testified that he was not privy to all of the discussions because he was working in his office at the time, he specifically recalled that prior to leaving the offices of CN&S, Thomas stated words to the effect of "'I'm quitting the case.'" (N. Tr. I at 106). Neufeld heard no objection from either Figeroux or Roper-Simpson. (Id. at 107).

Rubenstein testified that he arrived at 99 Hudson Street and had just walked into the office when Thomas and Figeroux came walking towards him. (R. Tr. at 53). Rubenstein could not recall if Roper-Simpson was there. (Id.) One of them said to Rubenstein, "we quit." (Id.) When Rubenstein asked why, one of them, either Thomas or Figeroux, simply said, "we quit" and kept on walking. (Id.)

T&F concede that there was conflicting testimony as to whether either Thomas, Figeroux, or Roper-Simpson stated that they "quit" or "resigned" (compare R.S. Tr. I at 128, L. Tr. at 162-63, C. Tr. I at 230, S. Tr. I at 102-03, R. Tr. at 53, N. Tr. II at 261), but they contend that this is irrelevant because their "termination was not voluntary." (T&F Post Trial Br. at 38).

S. The Resignation Letter

According to Scheck, after Figeroux, Thomas and Roper-Simpson left the office, there were discussions with Louima about what should happen next. (S. Tr. I at 104; N. Tr. I at 107). CN&S were concerned about what might be said to the press by Thomas and Figeroux and they immediately drafted a letter to make

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to be kicked off the case." (Id. at 59). Later that night, after this meeting, he came back very upset, breathing heavily. (Id. at 60).

sure that T&F would not reveal anything that they had learned of a confidential or privileged nature while representing Louima. (S. Tr. I at 104-05; N. Tr. I at 107-08). Scheck noted that "[w]e were very concerned that they might say something about . . . Louima's behavior, demeanor [or] conduct." (S. Tr. I at 105). Thus, after T&F left, Neufeld, Scheck and Louima sat in Neufeld's office and drafted a letter (Ex. 8),[69] instructing Thomas and Figeroux not to make any comment or talk to anyone about the case and noting they had resigned. (L. Tr. at 43; N. Tr. I at 108). Louima was physically present when the letter was drafted as was Rubenstein, who testified that he saw the letter as it was being prepared. (R. Tr. at 53). Louima approved the letter, told CN&S that he thought it was a good idea, signed it, and the letter was delivered by messenger from Rubenstein's office. (L. Tr. at 4344; Ex. 8; N. Tr. I at 108; R.S. Tr. I at 129).[70]

The January 23, 1998 letter, which was addressed to T&F, stated: "I accept your resignation as my attorneys as tendered orally this afternoon." (Ex. 8). The letter seeks "an accounting . . . for the time and expenses" incurred by T&F and by "your colleague Casilda Roper-Simpson." (Id.) The letter then explicitly instructed the attorneys not to disclose confidential information or secrets: "I do not intend to comment on the reasons surrounding your resignation," noting that "it is imperative that everything you have learned in the course of representing me, including this letter, be

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[69] Louima identified Exhibit 8 as the letter that was drafted that day after T&F left, instructing them not to talk about Louima's case. (L. Tr. at 30).

[70] Roper-Simpson stated that the letter came by messenger ten to fifteen minutes after they had returned to Thomas and Figeroux's office. (R.S. Tr. I at 129).

kept confidential." (Ex. 8). The letter further reminded T&F that their "professional and fiduciary duties to [Louima] survive the end of [their] representation." (Id.)

The letter then explicitly states:

> I am requiring that all information you have gained in the course of our professional relationship be held inviolate unless and until you receive express written permission for me. Any written authorization shall be limited to the specific communication described in the authorization and shall not be construed as a broad or blanket authorization or waiver.
>
> Moreover, it is essential that you recognize that the types of information covered by this requirement go well beyond privileged communications. For instance, it includes, but is not limited to, observations about my behavior, demeanor, and conduct, as well as information gained through discussions with other attorneys, witnesses, my friends, and family. I too appreciate that you will adhere to these rules. (Id.)

According to T&F, after the January 23rd meeting, CN&S prevented T&F from speaking with Louima. (T&F Post Trial Br. at 38). Thomas went to Louima's house after the meeting, but Louima was not home. (L. Tr. at 141-42). Thereafter, a second letter was sent to T&F, signed by Louima, instructing T&F not to communicate directly with Louima but only through CN&S. (Ex. 9). This second letter, dated January 29, 1998, advised T&F to speak to CN&S or Rubenstein if they wished to communicate with

Louima; "Effective today, I advise you not to make any attempt to communicate with me directly." (Id.)

Figeroux acknowledged receiving Exhibit 8 and understood that Louima was requesting that T&F not speak to the press. (F. Tr. I at 229-30; F. Tr. II at 2-5). Figeroux also acknowledged that from January 23, 1998 until the date of the hearing, the only authorization received by T&F to speak about the case was the authorization given by Louima to allow Figeroux to speak to the FBI. (F. Tr. II at 4).[71]

Neither Figeroux nor Thomas ever indicated orally or in writing that they disagreed with the January 23rd letter. (S. Tr. I at 112; N. Tr. I at 109). Although the first sentence in Louima's letter says, "I accept your resignation as my attorneys as tendered orally this afternoon," [T&F] never disagreed with this statement nor did they inform CN&S that they thought they were entitled to make public statements. (S. Tr. I at 112) Although the January 23rd letter asked for an accounting from T&F for purposes of payment, T&F decided to assert their right to share in the contingency fee (F. Tr. III at 23-24), and they further believed that there was nothing to be gained by responding to the letter. (Id. at 22-23).

Thompson testified that he learned from Neufeld, and then from either Thomas or Figeroux, that Thomas and Figeroux were no longer representing Louima. (T. Tr. at 253-54). Neufeld told Thompson that they had resigned. (Id. at 254). Thompson said that he did not question Neufeld about it because it had been clear that there were tensions among the lawyers; "[s]o it didn't surprise me that Brian and Carl got off the case." (Id. at 255).

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[71] See discussion infra at 84-86.

T. Post-Termination Press

After the resignation of T&F, there were "many" articles in the media regarding the resignation and Figeroux and Thomas continued to speak to the press about the case. (L. Tr. at 44).

On January 28, 1998, The New York Times ran an article by Gary Pierre-Pierre, quoting Figeroux as saying that he and "his law partners . . . Thomas and . . . Roper-Simpson" "resigned" from representing Louima, but "declin[ing] to say why." (Ex. 13). The article further indicates that Neufeld confirmed that T&F had "left the case" but he also declined to comment further. (Id.) The article then quotes "someone involved in the case"[72] as reporting that "Louima met with all of his lawyers on Friday and offered the three a choice of resigning or being dismissed." (Id.) This same anonymous source is quoted as stating that "[t]he other lawyers had lost confidence in them [t]he whole 'Giuliani time' thing was suspect." (Id.). The article, without attribution, relates a "heated discussion" between Thomas and Neufeld, approximately one month earlier, in which the "two lawyers questioned each other's legal skills and Mr. Thomas even cursed Mr. Neufeld." (Id.)

On that same day, the Daily News also published an article about the departure of T&F from the team. This article quotes Thomas as saying that "Louima's reversal on the 'Giuliani time' quote . . . 'exacerbated differences' among the lawyers." (Ex. 14). Citing "'professional and ethical differences,'" Thomas is quoted as

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[72] Although Rubenstein was questioned about this article and asked if he was the source of this information, Rubenstein denied being the one who made these statements to Pierre-Pierre, while at the same time acknowledging that he knew the reporter and had been asked for information about the Louima matter. (R. Tr. at 63-65).

saying: "'We think their leadership is in the wrong direction and we couldn't support it.'" (Id.) These same quoted remarks also appear in the January 28, 1998 issue of the New York Law Journal. (Ex. 15).

The following day, January 29, 1998, The New York Times published an article by Garry Pierre-Pierre entitled, "Former Louima Lawyer Says New Team Ignores the Big Issue." (Ex. 16). Thomas again is named as the source of certain statements critical of the CN&S legal team, stating that T&F had been "pushed aside by Johnnie L. Cochran Jr." and accusing CN&S of being interested only in the money and showing little concern for the broader issue of police brutality: "'We've always felt that we were part of a movement to stop police brutality in New York,' said the lawyer, Carl W. Thomas . .. . 'But it was just being dealt with as a case about money, and that's not enough.'" (Id.) The article quotes "a person involved in the case" as stating that Louima gave Thomas, Figeroux and Roper-Simpson "the choice of resigning or being dismissed." (Id.)

A Daily News article of January 29, 1998, written by Lawrence Goodman, also contained statements attributed to Thomas. The article states that Thomas "resigned because the O.J. Simpson legal dream team . . . didn't care about battling police brutality." (Ex. 17). Neufeld, in response, is quoted as saying that the T&F lawyers were "'discharged.'" (Id.) The article further quotes Thomas as follows:

> "These guys had no organic connection to civil rights" "They were unconcerned about what was taking place and didn't understand what it meant." [Thomas] accused Cochran partners Neufeld and Barry Scheck of having a "white liberal

background where they had to control everything."

(Id.) Thomas also is quoted as stating that Cochran "'has a significant amount of baggage' stemming from the Simpson case including the 'perception that he was, in some ways, dishonest.'" (Id.) The piece quotes Thomas as stating that, at the January 23rd meeting, he had said "'I wanted the leadership,' and demanded [that] 'Cochran no longer act as the lead attorney in the case.'" (Id.) Neufeld is quoted as stating that Thomas was "'discharged' and did not quit." (Id.)

Neufeld testified that he was contacted by Goodman prior to the publication of the article and was told that Thomas had given the writer four reasons for T&F's resignation, which Neufeld testified "were comments which disparaged [CN&S]. . .[and] the client." (N. Tr. I at 113). Neufeld explained that as a result, he was "very upset" and told Goodman "that based on this conduct alone they certainly could be discharged." (Id.) He denied stating that they had been fired, noting that he had already told The New York Times and an employee of the Corporation Counsel's Office that T&F had resigned. (Id. at 113-14; N. Tr. II at 129-32).

The press leaks continued into February 1998. A February 1998 article in Haiti Progres reported an interview with Thomas in which he is quoted extensively about the friction between the CN&S and T&F lawyers. (Ex. 31). Again, much of Thomas' remarks were focused on his view that CN&S lacked links to the community and an expressed "fear" that Cochran's team would not address the broader social issues implicated by the case. (Id.)

According to Scheck, Louima saw an article dated February 3, 1998 by Peter Noel published in The Village Voice, entitled "Louima's Dream Team Crumbles." (S. Tr. I at 110-11;

Ex. 18). Louima expressed concern that these types of statements would not help him when he was testifying as a witness and would not help either his civil case or the criminal case. (Id. at 110-11). All of these articles were published after Louima sent the letter of January 23, 1998 to T&F. (Id. at 111).

On February 6, 1998, Neufeld wrote a letter to Thomas and Figeroux reminding them of the January 23rd letter and expressing "Mr. Louima's serious concern with your continued communications with the press concerning privileged and confidential matters arising from your representation of Mr. Louima," and their "repeated violations of Louima's express instructions in the January 23rd letter." (N. Tr. I at 114; Ex. 10). The letter noted the critical importance of their silence given the expected return of criminal indictments in the then near future and further warned that: "There is no question your conduct violates the Code of Professional Responsibility. We advise you to cease and desist." (Ex. 10). According to Scheck, this letter was authorized by Louima who was upset about the continued press statements. (S. Tr. I at 114-15). Thomas and Figeroux did not respond to the February 6, 1998 letter. (Id.; N. Tr. I at 114). On June 1, 1999, Louima sent another letter to Thomas, Figeroux and Roper-Simpson to remind them of their obligations of confidentiality. (Ex. 11; N. Tr. I at 114-15).

Figeroux testified that he had not seen the January 28, 1998 Daily News article until it was produced in connection with the fee hearing, and he also stated that he was not aware that Thomas was communicating with the press after January 23, 1998. (F. Tr. II at 6). However, when shown Exhibit 10, the February 6, 1998 letter from Neufeld which mentioned the press leaks, Figeroux acknowledged having received the letter. (Id. at 8). He could not recall, however, whether he had read any of the articles in which

either he or Thomas was quoted; "No I heard rumors, people talking about the case, you know . . . but I never followed up or anything like that." (Id. at 10).

Approximately one week prior to February 17, 1998, an article appeared in The Village Voice, entitled "Fallen." (S. Tr. I at 115; Ex. 19). This article quotes Thomas as saying, "'We will not be intimidated by Peter Neufeld and his media-hungry associates." (Ex. 19 at 2). According to the article, Thomas "insists that he and his colleagues resigned and claims Neufeld was behind an attempt to prevent them from condemning 'unethical behavior' by the O.J. Simpson 'dream team.'" (Id.) The article noted that the controversy between the lawyers "has undercut the emotional wave on which Abner Louima has been riding in the Haitian community." (Id.)

Thomas is also quoted extensively as describing a meeting among the lawyers at which the origins of the Giuliani time statement were explored. (Id. at 4). Thomas stated that he and Figeroux "offered to resign." (Id.) In the article, Thomas also describes the initial meeting between Cochran and Louima in the hospital. (Id.) Figeroux is also quoted in the article, stating that after Cochran "launched into a sales pitch" with Louima, "'he came to me [Figeroux] and whispered, 'I'd like to come on as a consultant.'"" (Id.)

Some of these same quotes appear in a July 7, 1998 Village Voice article written by Peter Noel. (Ex. 20). This article, entitled "Johnnie Came Lately," again quotes Thomas: "Thomas, a former assistant district attorney, . . . accused Cochran and company of ignoring minority concerns about cops and of isolating the case from the larger movement against police brutality." (S. Tr. I at 117-18; Ex. 20). Scheck testified that Louima was concerned that these statements would undermine his support in the community and he

was concerned about "the perception that either Mr. Cochran or myself or Mr. Neufeld would engage[] in tactics that were deceiving," particularly since Louima understood from discussions with Mr. Vinegar and his attorneys that, during the criminal trial, Louima could be cross-examined about the civil case and his relationship with his lawyers. (S. Tr. I at 118-19).

The July 7, 1998 article also stated that: "In January, Thomas, Brian Figeroux, and Casilda Roper-Simpson quit the Louima legal team over what they described as 'professional and ethical differences' with Cochran, Scheck, and Neufeld." (Ex. 20). Scheck denied ever discussing any such issues with any of the T&F lawyers nor was he present when any such conversations took place. (S. Tr. I at 120-21). In addition, in this article, Thomas discussed a dispute among the lawyers over the amount requested in the Notice of Claim, alleging that, in persuading Louima that T&F had made a mistake in filing a Notice of Claim for only $55 million, "'Cochran used Abner's ignorance of the law to try to create a problem for us.'" (Ex. 20 at 5).[73]

In a subsequent Village Voice article dated September 22, 1998, Thomas is referenced as stating that the conflict between the attorneys "arose when he and his colleagues felt that [CN&S] . . . had improperly entered the explosive case." (Ex. 21). Among various quotes appearing in this Village Voice article, also by Peter Noel, entitled "Ex-Louima Lawyers' Lien on 'Dream Team,'" was

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[73] As Roper-Simpson conceded, however, it was Rubenstein who prepared the initial Notice of Claim (R.S. Tr. I at 144-45; R. Tr. at 39), and that in being critical of the amount, Cochran "was sort of putting down Mr. Rubenstein's amount that he put [in] the original Notice of Claim." (R.S. Tr. I at 144-45).

the following statement from Thomas: "Thomas described Cochran as a racial ambulance chaser who may have 'broken ethical canons' when he allegedly sidestepped Louima's original legal team to solicit the role of lead attorney." (S. Tr. I at 122; Ex. 21). According to Scheck, this issue was never raised with CN&S by either Thomas or Figeroux. (S. Tr. I at 122). This article, along with a March 28, 2000 article in The Village Voice, entitled "Shake the Trees," allegedly written by Thomas, was brought to Louima's attention and, according to Scheck, Louima was very "upset" by these articles. (Id. at 12123; Ex. 22).

T&F contend that these comments to the press were "restrained and truthful, going no further than necessary to explain why Thomas & Figeroux had left the case." (T&F Post Trial Br. at 40). They contend that the quotes "accurately reflect[]" the alternatives given to T&F "resign[ ] or surrender . . . all authority as counsel." (Id. at 41). They argue that the statements quoted in the press, suggesting that Figeroux was the subject of a federal investigation as a result of the Giuliani time statement, "invited response" from T&F. (Id. at 42).

When questioned, however, Figeroux acknowledged that many of the things revealed to the press were in fact "secrets" gained during the course of their professional relationship with Louima. (F. Tr. II at 18-19, 21-22, 25, 27, 40-47). He also conceded that Thomas' statements to the press in Exhibits 16, 17, 18, 19, 21, and 31 were not made in a "restrained manner." (Id. at 24-25, 27, 40-43, 45, 47).

Figeroux admitted discussing the issue of press leaks with Thomas after receiving Neufeld's letter dated February 6, 1998, and stated that he presumed that what Thomas was doing was "in Thomas and Figeroux's best interests in regard to the Louima case

and he would conform to whatever guidelines." (Id. at 32-33). However, he also conceded that, in general, the lawyers were required to do what was in Louima's best interest rather than their own interest. (F. Tr. I at 226). According to Figeroux, when he asked Thomas about the press issue, Thomas told him to "'just ignore that because . . it''s not true.'" (F. Tr. II at 34). Figeroux admitted, however, that he took no steps to read any of the articles to find out what Thomas was saying. (Id. at 36).

U. The Allegations Contained in the Attorneys' Fee Papers

On March 12, 2001, CN&S submitted a Memorandum of Law in support of their application for fee forfeiture, along with an affidavit from Scheck, describing the events leading up to the resignation of T&F, and detailing certain aspects of the alleged misconduct by T&F.[74] Among other things, Scheck's affidavit related a conversation that had occurred on March 6, 2001, a week prior to the filing of the affidavit, at which Neufeld, Rubenstein and Figeroux had been present. (Scheck Aff. ¶ 26; N. Tr. I at 116-117). According to Scheck, Figeroux had threatened "'to go to war'" against Louima, CN&S, and the Rubenstein firm if T&F were not paid one-third of the legal fees in the case. (Scheck Aff. ¶ 27; N. Tr. I at 118). Figeroux also stated that the fight would be "'on many different fronts,'" and T&F would "'win, no matter what the cost.'" (Scheck Aff. ¶ 27; N. Tr. I at 118). According to the

[74] CN&S later added to their complaint of wrongdoing the allegation that T&F further injured Louima's interests by alleging in their fee papers, particularly in the December 19, 2001 Affidavit of Mr. Figeroux, that Louima and CN&S had engaged in a scheme to suborn perjury. (Affidavit of Peter Neufeld, dated January 25, 2002 ("Neufeld Aff."), at ¶¶ 8-17; S. Tr. I at 4-6). See discussion infra, at 79-80.

Scheck Affidavit:

> Mr. Figeroux then told Mr. Rubenstein and Mr. Neufeld a story about a "short jewish man" who had written an unfavorable story about him years ago. Mr. Figeroux claimed that he pulled the man aside and told him that in retaliation for what the man had said about him, he would go into the man's community and "make war against the man and his family." When Mr. Neufeld asked Mr. Figeroux if he was making a threat, Mr. Figeroux replied: "It's not a threat, it's a promise."

(Scheck Aff. ¶ 27; see also N. Tr. I at 117-118).

Later, when asked during the fee hearing about the March 6th meeting described by Mr. Scheck in his affidavit, Figeroux first testified that he did not recall that meeting. (F. Tr. I at 78-79). Figeroux admitted that he received Scheck's March 12, 2001 affidavit, which described this meeting that had occurred six days earlier, but he initially denied having read the affidavit. (Id. at 84-85). Following colloquy with counsel, Figeroux then testified that he "browsed through most of it. I read some parts of it. I didn't read all of it." (Id. at 86). He then could not remember if he read the part in the affidavit about the March 6th meeting. (Id.)

When asked whether he told Rubenstein and Neufeld a story about "a short Jewish man" who Figeroux had "made war against the man and his family," Figeroux first testified that maybe they did not understand him because of his "thick Trinidadian accent" and that he "did not say that." (Id. at 87-88). Then he stated that he "never knew whether or not the guy that I was talking about was Jewish. I did not say he was a short Jewish man." (Id. at

88). He also denied saying that he "made war against the man and his family." (Id.) When asked about the claim that he threatened to "go to war" against Louima, Figeroux testified that he recalled telling the other lawyers that if T&F were not paid what they had contracted for, "that we would take all measures, call it war or call it whatever you want to secure our rights." (Id. at 80). He did not, however, recall saying that they would "go to war" against Louima personally. (Id.) When asked if he told the other attorneys that the issue of legal fees "'would not end with a decision in the courtroom' and that he would fight 'on many different fronts' and would 'win, no matter what the cost'" (Scheck Aff. ¶27), Figeroux testified that he did not recall if he used those specific words, but he admitted telling CN&S that he would "take whatever steps are necessary . . . to protect our interest." (Id. at 81). He could not recall whether Neufeld asked him if he was threatening Rubenstein and Neufeld, although he admitted saying, "'It is not a threat, it is a promise.'" (Id. at 89). He claimed that that particular statement was made in the context of the story he was telling and was not directed at Neufeld and Rubenstein. (Id.)

At the time the Scheck affidavit was filed in March 2001, CN&S, on behalf of Louima, sought a protective order preventing any of the attorneys from discussing the motion for fees in public. Based on the threats from Figeroux, the past press leaks and the fact that CN&S were attempting to settle the civil action, CN&S asked this Court to order that all papers filed in connection with the fee application be sealed. That application was granted on March 12, 2001.

Thereafter, in response to CN&S's moving papers, T&F filed a Memorandum of Law dated April 18, 2001, in which counsel asserted that T&F was "forced off the case through the elimination of [their] role as co-counsel" (T&F Mem. at 2), and that

they "'resigned' after they were constructively discharged through the effective elimination of their role as co-counsel." (Id. at 5).[75]

With respect to the accusation that T&F allegedly disclosed client confidences and secrets, T&F contended in their initial responsive papers that "[a]t the time the alleged statements were made, [T&F] . . . were subject to public criticism and misrepresentations regarding the circumstances under which they were discharged, or forced to resign, from the case." (T&F Mem. at 9-10). T&F also stated in their responsive papers that they "made certain very limited statements to the press describing in broad, general terms the disagreements among counsel that led to their departure from the case, and denying the accusations of misconduct," and they contended that "[n]one of these alleged statements constitutes a disclosure of protected client information." (Id. at 2).[76] T&F claimed that they "were mindful of their obligations to Mr. Louima and careful not to say anything more than was necessary to defend their reputations and explain their sudden departure from the case." (Id. at 6). They also claimed that any statements that were made were " necessary to establish their [right] to a fee" in the case. (Id.) Indeed, during the fee hearing, although Figeroux did not recall making any of the statements attributed to T&F in the various articles (F. Tr. I at 228), he testified that his "understanding was that anything that was done would have to be

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[75] At the hearing, it appears as though T&F are now arguing that they were entitled to resign because they were "never allowed to serve in their role as lead counsel" and otherwise were "marginaliz[ed]." (S. Tr. I at 9).

[76] This claim was, of course, subsequently contradicted by Figeroux's own testimony at the hearing. (See discussion supra at 75; see also F. Tr. II at 24-25, 27, 40-45).

defensive if anything was said about [T&F] resigning." (F. Tr. II at 32).

Finally, in their April 2001 papers, T&F took the position that the statements made did not reveal anything that was not "already generally known" and were in fact the "opinions of Messrs. Thomas and Figeroux regarding the circumstances under which they were forced out." (T&F Mem. at 8). They contended that these opinions did not "implicate any client secrets or confidences," but related "solely to broad, strategic disagreements among counsel." (Id. at 9).

V. The Figeroux Affidavit

In December 2001, while the criminal case against defendant Schwarz was still pending, T&F filed an affidavit from Figeroux, dated December 19, 2001 ("Figeroux Aff."), in which he alleged that T&F "were forced to resign because of ethical and strategic disagreements with our co-counsel that made it impossible for us to continue to represent the Louimas in the way that we believed was appropriate." (Figeroux Aff.¶ 2). The affidavit further charged CN&S and Louima with engaging in serious, even criminal, misconduct:

> [A]fter CN&S entered the case, representatives of the U.S. Attorney's Office, with whom Mr. Thomas and I had an excellent relationship, called us to tell us that they were concerned that Mr. Scheck was improperly influencing witnesses' testimony by meeting with witnesses before the prosecutors had a chance to interview them, and essentially telling the witnesses what to say.

(Id.¶12). According to the affidavit, "Representatives of the U.S. Attorney's Office asked us to put a stop to this practice." (Id.) Mr. Figeroux then stated in his affidavit:

> We knew that Mr. Scheck and others associated with CN&S had been meeting with witnesses, sometimes in groups, and "preparing" them in ways that we (and at least some members of the U.S. Attorney's Office) believed to be improper. We spoke to Mr. Scheck about it, and he refused to listen to what we had to say. This obviously exacerbated the tension among attorneys on the case, and was one of the ethical issues that eventually led to our being forced off the case.

(Id.)

The affidavit contained an even more serious charge directed not only against the CN&S attorneys but against Louima, suggesting that after CN&S lawyers had met with Tacopina, Figeroux "observed a change in Abner's testimony." (Id. ¶ 14). Specifically, the Figeroux affidavit stated:

> We also learned at some point that the CN&S lawyer[s] were having secret meetings with Joseph Tacopina, counsel for Thomas Weise. We did not believe that such meetings were likely to benefit the Louimas. In fact, we believed that such meetings, and our lack of prior notice regarding them, were improper. After this meeting, we observed a change in Abner's testimony regarding his recollection of which officer - Weise or Schwarz - - was present in the bathroom while Volpe was

> assaulting Abner. This contributed to our sense of discomfort with the way that witnesses -- including Abner -- were being handled by our co-counsel. We raised these concerns with our co-counsel on numerous occasions, but our concerns were rebuffed and ignored.

(Id.) Thus, in this Figeroux affidavit, T&F appeared to have supplemented their earlier position as to why they had withdrawn from the case, now asserting that their withdrawal was prompted by ethical concerns relating to misconduct by Louima and by CN&S.[77]

W. CN&S Response to the Figeroux Affidavit

CN&S sought an order from this Court on January 25, 2002, continuing the prior March 12, 2001 Protective Order and seeking to modify it to prevent "Figeroux and those associated with him, in the 'guise' of preparation for the [fee] hearing, from disclosing in any way the supposed confidences and secrets relating to the obviously fabricated story of the perjury conspiracy." (CN&S Mem. of Law, dated Jan. 25, 2002 at 12). CN&S asserted that any knowledge Figeroux could have as to a change in Louima's testimony would have been gained as a result of either

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[77] It should be noted that not only did these new allegations not appear in the April 18, 2001 Memorandum filed by T&F's counsel, but the claims were also not made in any of the legal submissions filed by Ms. Roper-Simpson. Although Ms. Roper Simpson's affidavit, dated March 29, 2001 ("Roper-Simpson Aff."), alleges that the manner in which CN&S came into the case constituted a violation of ethical rules, she says nothing regarding the Tacopina meetings or a change in Louima's testimony. (Roper-Simpson Aff. of Mar. 29, 2001¶¶ 25-33).

privileged conversations with Louima or through his observations of his client during the course of the representation, and thus Figeroux's affidavit constituted a breach of his ethical obligations to Louima.

In connection with that application, Neufeld submitted an affidavit to this Court asserting that Figeroux "has recently engaged in a scheme to falsely accuse Mr. Cochran, Mr. Neufeld, Mr. Scheck and Mr. Louima of participating in a perjury conspiracy," and that these "false allegations" were designed to "defeat[] the pending fee motion" of the CN&S firm. (Neufeld Aff. ¶¶ 8, 10). Neufeld further noted that Officer Schwarz had been "engaged in a well-publicized campaign aimed at overturning his much justified conviction" by proclaiming his innocence, and that Figeroux's allegations that Louima lied about Schwarz's role, if made public, "will set off a media frenzy" that would seriously harm Louima. (Id. ¶ 11).

Mr. Neufeld further swore in his affidavit that Louima's testimony before the state grand jury on two occasions, before the federal grand jury in February 1998, and then in the three subsequent federal criminal trials was consistent in that the driver of the car -- Officer Schwarz -- "'was present in the bathroom while Volpe was assaulting Abner.'" (Id. ¶ 13).

When shown the statement in Figeroux's affidavit of December 19, 2001, that the original team was "forced to resign because of ethical and strategic disagreements with our co-counsel," Scheck testified at the fee hearing that no such issues had ever been brought to his attention. (S. Tr. I at 125-26). Mr. Scheck also denied the truth of the statement in Figeroux's affidavit which read: "Mr. Scheck was improperly influencing witness testimony by meeting with witnesses before prosecutors had a

chance to interview them and essentially telling the witnesses what to say." (Id. at 127). Scheck further denied "meeting with witnesses, sometimes in groups and 'preparing' them in ways that we (and at least some members of the United States Attorney's Office) believed to be improper." (Id. at 128). He not only denied preparing witnesses "in groups," but he stated that neither Thomas or Figeroux had ever told Scheck that they felt he was improperly preparing witnesses, contrary to the claim in the affidavit that "we spoke to Mr. Scheck about it, and he refused to listen to what we had to say." (Id. at 128-29). Scheck also denied that either Ms. Palmer or anyone else from the U.S. Attorney's Office ever asked the CN&S lawyers to stop speaking to witnesses or ever asked Scheck to stop telling witnesses what to say. (Id. at 127-28, 131-32).

Neufeld similarly denied that he or Scheck, to his knowledge, had ever "improperly influenced any witness's testimony," never told a witness what to say, and was never asked by the government to put a stop to this practice. (N. Tr. I at 120-21). He also denied the truth of Figeroux's statement that T&F had spoken to CN&S about it, but they refused to stop, noting that the only conversation Neufeld had with Figeroux about witnesses was one where Figeroux said "there was no point in speaking to certain Haitians witnesses because all Haitians lie." (Id. at 122).

Scheck testified that to his knowledge, neither the issue of witness preparation or ethics had anything to do with the tensions between counsel, although Scheck's investigation of the "Giuliani time" statement clearly did. (S. Tr. I at 129-30). Mr. Scheck also denied that either Thomas or Figeroux ever told him personally that they thought the meetings with Weise's counsel "'were improper,'" nor was Scheck ever made aware of "any change in Mr. Louima's recollection concerning who was present in the bathroom" during

the assault. (Id. at 132-133).

In response to a question from the Court, Mr. Scheck explained that at one point at the beginning of the case, Ms. Palmer had asked CN&S not "to send investigators out to canvass the whole neighborhood," but she "understood that we would be talking to witnesses and doing our own investigation." (Id. at 131). Cochran also testified that he and Scheck and Neufeld had interviewed multiple witnesses. (C. Tr. II at 44). Cochran admitted that he did not provide reports of these interviews to the U.S. Attorney's Office. (Id. at 45). However, Cochran denied ever having conducted a "parallel investigation," stating that CN&S encouraged witnesses to speak to law enforcement and turned over all relevant information to the government. (Id. at 49). Cochran explained that, although he generally questions the efficacy of government investigations of police wrongdoing, in this instance he had complete confidence in the U.S. Attorney's Office. (Id. at 50-52).

Palmer testified that while she was unaware of any independent investigations conducted by CN&S, she knew that CN&S were focused on building a civil case on behalf of Louima and pursuing a lawsuit against the PBA. (P. Tr. at 70-71).[78] While Mr. Thompson explained that it was important for the prosecution to control the investigation, he also knew that CN&S were interviewing witnesses and it was agreed that they would keep the

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[78] Palmer testified that, if she had known that CN&S were interviewing individuals who were potential witnesses in the criminal case without her knowledge or consent, she would have found that to be problematic. (P. Tr. at 73). However, Palmer also stated that the government had asked CN&S for assistance on several occasions in investigating certain matters related to the criminal case. (Id. at 70-71).

government informed and send witnesses on to the government. (T. Tr. at 248-49). Thompson was not aware, however, that CN&S had hired private investigators or interviewed more than 50 witnesses. (Id. at 149). Thompson noted that he would have had concerns with regard to a large scale investigation by CN&S, because witnesses might give conflicting accounts and would be less likely to lie to a federal agent or a prosecutor. (Id. at 250).

Mr. Vinegar testified that he was made aware of the fact that CN&S had interviewed people present at the Club Rendez-Vous on the night of the incident and had investigated the origin of the Giuliani time statement. (V. Tr. at 265, 267-68). Vinegar acknowledged that to the extent CN&S were representing Louima in the civil action, they "had an obligation consistent with Rule 11 to make sure that lawsuit was well founded and filed in good faith." (Id. at 301). While Vinegar was not aware of a broader investigation conducted by CN&S, he testified that if CN&S had been conducting their own extensive investigation of the facts, he would have wanted to know who they spoke to and what evidence they obtained. (Id. at 265-66).

X. The FBI Interview and Figeroux's Deposition

In response to CN&S' application to extend the protective order, T&F submitted a Memorandum in Opposition to Continuance of Protective Order, dated February 11, 2002, seeking to lift the Protective Order to allow the attorneys to discuss the various issues raised by the CN&S fee forfeiture application. In that Memorandum, T&F asserted that "Mr. Figeroux's allegations are . . . neither 'recent' nor a 'fabrication,'" and stated that "we will show at the hearing" that T&F raised their concerns about Louima's change in testimony with co-counsel and with the government. (T&F Mem. at 27 n.2). However, T&F also conceded in the

Memorandum that "without access" to the grand jury minutes, "it is impossible to assess the veracity" of the contention that Figeroux's allegation was false. (Id.) Nevertheless, the Memorandum further stated:

> Mr. Figeroux must make his own judgment about what his [Figeroux's] rights and obligations are with respect to disclosing, beyond this Court, his concerns regarding Mr. Louima's statements about the identity of his second attacker.

(Id. at 26). In moving to lift the protective order, Figeroux represented to this Court that he believed he had an ethical obligation to disclose the fact of Louima's changed testimony, presumably to prevent a future crime - - namely, perjury by Louima in the upcoming Schwarz trial.

Given that the hearing to address the fee dispute had been adjourned pending the trial of Officer Schwarz, this Court denied T&F's request to lift the protective order at that time, but modified it slightly with the consent of Louima to authorize disclosure to a federal Grand Jury of paragraph 14 of the Figeroux Affidavit and footnote 2 of the T&F Memorandum of Law. (Order, dated April 3, 2002). By letter dated March 27, 2002, the U.S. Attorney's Office had sought authorization to obtain these portions of the T&F Memorandum and Figeroux's Affidavit.

Following disclosure, the FBI conducted an interview of Figeroux on April 2, 2002. In the notes prepared by the FBI of the interview on April 2, 2002, Figeroux is reported to have admitted to the FBI that he did not know what Louima had testified to, conceding that he "'never read Louima's court testimony or the media accounts of that testimony.'" (F. Tr. I at 142; Ex. 43). He

also allegedly told the FBI that he was "'pissed that more people aren't in jail or charged' (with crimes related to the assault of Louima),"and that "'he believed] this is due to a lack of focus by the new attorneys.'" (F. Tr. I at 143; Ex. 43). Figeroux told the FBI investigators that although he believed it was Weise in the bathroom, at some point later, around the time of the Tacopina meetings, Figeroux learned that it was suspected that Schwarz was the second officer in the bathroom. (F. Tr. I at 146-48; Ex. 43).

When questioned at the fee proceedings about the FBI interview, Figeroux acknowledged that he told the FBI that he was concerned about what was being said in the media and that the case was not being properly investigated "due to the lack of focus by the new attorneys." (F. Tr. I at 142-43, 145). According to his statements to the FBI, Figeroux never said to anyone at the time of CN&S' meetings with Tacopina that Louima's account had changed. (Id. at 143). Figeroux testified that it was true that at that time, he did not know what Louima had testified to in court, but he also stated that it "may or may not be true," since, as he told the FBI, "he never read Louima's court testimony or media account of that testimony." (Id. at 145). Figeroux testified, "I never said that he said anything that was different. My problem is if he is saying certain things, why did the case go in x direction rather than y direction? I thought that day that Weise would have been the one in the bathroom rather than Schwarz. That is what I believed." (Id. at 146).

Following the FBI interview, the prosecutors, on April 22, 2002, provided certain disclosures to Ronald Fischetti, Esq., counsel to defendant Charles Schwarz, regarding Figeroux's statement that Louima had changed his story. The press quickly reported Figeroux's perjury charge against Louima. On April 30, 2002, an article in The New York Times reported that "a former

lawyer for Abner Louima once said Mr. Louima had changed his account on a pivotal issue." (Ex. 32). Another New York Times article, dated May 18, 2002, and referred to by CN&S in their papers filed after the fee hearing, quotes Schwarz's attorneys as stating that "Schwarz would very likely have been acquitted at the first trial had this information [Figeroux's statement] been disclosed." (CN&S Post-Trial Br. at 76). The New York Sun also ran an article on April 30, 2002, titled, "Louima Lawyer Said Schwarz Played No Role In Torture." (F. Tr. I at 129; Ex. 33). That article, quoting a motion filed by Schwarz's attorney, reported that, according to the government, "'Figeroux later recanted the statements.'" (F. Tr. I at 129, 151-52; Ex. 33).

This alleged statement by the government prompted Figeroux's attorneys to send a letter to this Court, dated May 13, 2002, asserting that the government's claim that Figeroux had "recanted" his statement was "less than entirely accurate," and arguing that it was necessary to lift the Protective Order so that Figeroux could publicly respond. (See Letter of Thomas Kissane, dated May 13, 2002, at 2, Ex. 57).[79] On May 10, 2002, the government provided that portion of Figeroux's affidavit dealing with Louima's purported change in testimony, as well as the notes of Figeroux's FBI interviews relating to this statement and to the "Giuliani time" investigation, to Fischetti. (See Letter of Alan Vinegar, dated May 10, 2002).

The government's disclosure prompted Fischetti to write to this Court seeking more information. (See Letter of Ronald Fischetti, dated May 21, 2002). Fischetti's motion eventually led to

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[79] Figeroux conceded that he had read the April 30 article in the New York Sun and that he knew that his December 19th affidavit was the subject of discussion among the lawyers and the judge in the Schwarz trial. (F. Tr. I at 129).

an order from the district judge presiding over the Schwarz trial, the Honorable Reena Raggi, allowing Figeroux to be deposed prior to the Schwarz trial.

On June 20, 2002, Fischetti conducted Figeroux's deposition. Fischetti questioned Figeroux about the affidavit submitted in the fee proceedings and the paragraph relating to the Tacopina meetings. (Ex. 41 at 31-32). At the deposition, Figeroux affirmed that the contents of the affidavit, including paragraph 14, were true and that he "read [the affidavit] before [he] signed it." (Id. at 31). However, when asked what change in Abner's testimony Figeroux observed, Figeroux could not remember anything that Louima had said that constituted a change in his recollection of the incident. (Id. at 32-36).

The following colloquy occurred at the deposition:

Q: You stated . . . that you observed a change in Abner Louima's testimony regarding his recollection of which Officer Wiesel or Schwarz was present in the bathroom while Volpe was assaulting Abner.

What observations did you make of Abner Louima that caused you to write that?

A. There was testimony that should be used, but it wasn't testimony, just, you know, we were having discussions with him over a period of time.

Q: And you noticed a change in what he was telling you that occurred after the meeting

that Cochran, Scheck and Neufeld had with Joe Tacopina, that is what you are saying?

A. During our discussions with him. I personally believed that at one time that it was Wiesel in the bathroom and not Schwarz. I cannot pinpoint any particular testimony, you know, discussions by Abner, but based on, from general point of view, that's what I believed.

Q. But you say here that "I observed a change in Abner." I am trying to find out what change you observed.

Did he tell you something differently than he had told you before?

A. I would say that change is more how do we move from - - at least in my head, Wiesel Schwarz, now, how did we move from that, you know. It was not general consensus that it was Wiesel in the bathroom. I am talking about my own personal. I thought it was Wiesel and not Schwarz, and throughout that time, discussions with Carl, you know, I let him know that I thought, and know, I was concerned about that.

Q: But you say in your affidavit that you observed a change in Abner's testimony.

You are now telling us not testimony but what he told you?

A: Right.

Q: What I would like to know is what change did you observe?

A: I can't pinpoint anything. I am just saying that based - - my opinion of what I knew at that time and there were other circumstances, obviously things that were happening that, you know, I thought that the focus was not on the client, but on other issues.

(Id. at 33-35) (emphasis added).

Ms. Roper-Simpson was also interviewed by the FBI and deposed in connection with the Schwarz trial. She testified that she saw no change in Louima's testimony: "I didn't notice any change in Mr. Louima's recollection of what happened. The only changes that I recall . . . [were] that he was more adverse to us, as to [CN&S]." (Ex. 42 at 44).

Y. Figeroux's Testimony at the Fee Proceeding

Figeroux was shown his December 19, 2001 Affidavit during the fee proceedings before this Court and asked if he intentionally filed a false affidavit in connection with the fee application. (F. Tr. I at 91). Figeroux denied that the affidavit was false. (Id.) When asked how he learned about the meetings between Tacopina and CN&S, Figeroux testified that he learned

about the meetings from Mr. Thomas. (Id. at 93). He testified that one of the reasons he ceased to represent Louima was because of these "improper" meetings. (Id. at 95). However, it is clear that the initial premise of paragraph 14 is false in that it suggests that Figeroux saw a change in Louima's testimony immediately after the Tacopina meetings. The evidence is clear that Figeroux, who learned of the Tacopina meetings from Thomas, did not learn of the meetings until long after they occurred.[80] When asked if he raised the issue of the Tacopina meetings with CN&S, Figeroux did not directly answer the question. (Id.) Instead, he responded by testifying that the statement in the affidavit that "'our concerns were rebuffed and ignored'" were his words and that he "didn't understand why we had to make decisions on the consensus and we couldn't act independently." (Id. at 95-96).

Figeroux was also questioned at the fee hearing regarding the statement in his affidavit that "[a]fter this meeting we observed a change in Abner's testimony regarding his recollection of which officer -- Weise or Schwarz -- was present in the bathroom while Volpe was assaulting Abner." (Ex. 56 ¶ 14). When asked if he ever saw a change in Louima's "testimony," Figeroux stated that "[o]bviously, that wasn't the situation." (F. Tr. I at 105). For the first time, Figeroux testified that "[w]e used the wrong words." (Id.) Figeroux testified that the word "account" might have been a better word to use and should have been the word used in the affidavit. (Id. at 131). Figeroux asserted that during the time he was representing Louima, he "always believed that the person who was in the bathroom was Weise and not Schwarz." (Id. at 103).

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[80] Thompson testified that Thomas learned about the Tacopina meetings from newspaper accounts. (T. Tr. at 285, 287). The first newspaper accounts of the Tacopina meetings were published in November of 1998. (Id. at 287).

Although the affidavit refers to a "change in Abner's testimony," Figeroux testified that "I believe I may have overlooked the word [testimony] at the time when I signed it. I realized it and we remedied that." (Id. at 98). Figeroux testified that he did not draft the affidavit, and when asked if he saw a draft before he signed it, he testified that he could not remember. (Id. at 99). He admitted that the affidavit was an important document and that he was swearing to it under oath. (Id. at 100-01). He conceded that by using the word "testimony" in his affidavit, he had accused Louima of changing his testimony and that "obviously caused problems." (Id. at 120-21). Figeroux admitted that there was public controversy as a result of his affidavit, which suggested that Louima was not telling the truth. (Id. at 153-54).

Figeroux was questioned at the fee proceeding regarding his testimony during the deposition taken by Fischetti. (Id. at 106). Figeroux agreed that when Fischetti asked him about this statement in his affidavit during the deposition, Figeroux told him that the change was not in Louima's testimony "but [in] what he told" Figeroux. (Id. at 107). Later, Figeroux insisted that Louima's account of the incident had changed, "because he [Louima] made certain statements and for whatever reason the government investigators didn't believe him." (Id. at 134). Figeroux testified that "[f]or whatever reason the client I was concerned that if Schwarz was I believe that I had an obligation to say something, and that is what I did." (Id. at 134-35).

However, when pressed during the fee hearing to verify that he had told Fischetti that he could not identify any change in Louima's "testimony," Figeroux responded that he could not recall what he had said in that regard at the deposition. (Id. at 107). When asked when Figeroux first realized there was a mistaken use of the word "testimony" in his affidavit, Figeroux testified that he

could not remember. (Id. at 110). He later claimed that he discovered in March 2002 that there was an error in the affidavit when he met with his attorney prior to meeting with the FBI. (F. Tr. II at 81). However, when shown Neufeld's affidavit of January 25, 2002, claiming that Figeroux "has recently engaged in a scheme [to] falsely . . .accuse Mr. Cochran, Mr. Neufeld, Mr. Scheck and Mr. Louima of participating in a perjury conspiracy," Figeroux conceded that he had seen Neufeld's affidavit before. (F. Tr. I at 115-16). Figeroux then admitted that it was in January 2002 that the mistaken use of the word "testimony" was pointed out to him. (Id. at 116, 118). When asked if he knew what his obligations were to correct the false statement, Figeroux testified that "[w]hatever my obligations were at that time I can't say - - my attorney addressed those issues." (Id. at 120). However, he could not recall when he corrected the error. (Id. at 110).[81] When asked what was done to correct the error, he testified that his understanding was that "a number of meetings were arranged. I was deposed by [Fischetti]. . . . and steps were taken to correct this error." (Id. at 120).

Figeroux further testified that his "presumption was that the correction was supposed to be made when we met with the FBI." (Id. at 154). He denied that he had done nothing to correct the statement between January 25, 2002, when Neufeld raised it in his affidavit, until he met with the FBI in April 2002, stating "[t]hat is not true. I met with my attorney sometime in March. We discussed that issue in detail. We went through the statements together, and we addressed that issue." (Id. at 156). He believed that his attorney "would deal with that issue." (Id. at 157). Figeroux claimed that the

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[81] It is unclear in what way Figeroux believed the error had been remedied. Indeed, as of the date of the hearing no correction had been filed with this Court.

affidavit wasn't false, but that the use of the term "testimony" "was an error that was made.... It was not intentional." (Id. at 159).

However, through May of 2002, Figeroux refused to admit that there was an error in the affidavit, as evidenced by his lawyers' letter requesting this Court to lift the protective order. (Id. at 149-50). That letter specifically states that "we wish the court to be aware that we . . . disagree with the government's assertion that Mr. Figeroux recanted the statements in Paragraph 14 of his December 19, 2000 affidavit." (Id. at 151-52). Even at the fee proceeding, Figeroux testified that he "never thought there was . . . any false statements in paragraph 14." (F. Tr. II at 88). He testified that other than the word choice of "testimony" which was a "mistake," nothing else was inaccurate about the paragraph. (Id. at 89).

Figeroux also claimed that he raised the issue of his concern regarding Louima's identification of his second assailant with Neufeld and possibly with Scheck or Rubenstein in the fall of 1997. (Id. at 77-78). He claims he was "casual" so they may not have paid attention to it. (Id. at 78).

When Figeroux was asked by this Court at the fee proceeding if he actually did observe a change in Louima's account of which officer was in the bathroom, Figeroux never directly answered the question. He stated:

> THE WITNESS: Most of it was directly only the discussion among the attorneys, and it was not a change in his. He, at one time, obviously, he said one thing to the prosecution, right? They questioned him, and he said X, and they said it is not true. All right?

> At whatever time he probably - - they decided it was true, because they the trial, is that right? So at one time we were not there for all of the meetings. We were in there for the trial itself for Volpe and for others.
>
> If my concerns at that time, right, that it was Wiesel rather than Schwarz. I never felt comfortable about how it became Schwarz rather than Wiesel.
>
> Obviously, they may have corrected that information as they went along. The FBI might have corrected, whatever.
>
> . . . . Then when the issue came up in the news that it was not Schwarz, it wasn't Wiesel. Schwarz was saying it was not him in the bathroom, and all this issue came up. Then I became concerned again.
>
> That is specifically what I was trying to address there. That whatever happened, I wanted the truth to come out.

(F. Tr. I at 135-36).

However, when pressed again by the Court as to what specific statements Louima had made that constituted a change in Louima's account, Figeroux again could not answer the question. He stated:

> THE WITNESS: My concern was that at the early stages I really believed that the person who was in the bathroom, based on Abner's account, was Wiesel. That was in the early stages of the case.
>
> For whatever reason, I believe that and others may not believe it. I think we discussed it. That was based on what Abner said.
>
> So if logically at some point in time if, you know, I wasn't there all of the time, right? If for whatever reason, okay it is now Schwarz and Wiesel. Let's accept it, all right? There had to be to me in my mind either some changes in his account or I don't know what evidence the government had gotten to enhance that argument that Schwarz was the guy in the bathroom rather then Wiesel.

(Id. at 137-38).

Despite his inability to answer this Court's question, when questioned by his attorney on the next day of the hearing, Figeroux suddenly recalled the basis for his conclusion that there might have been problems with Louima's identification of the second attacker. (F. Tr. II at 92). Specifically, he claimed that during the break in his testimony, he decided to reread the notes of the meeting between CN&S and Tacopina. (Id. at 92-94; Court Ex. 1). Although he had read them before, he claimed that his recollection was refreshed as follows:

> A. The paragraph starting heading towards the

> beach on Flatbush Avenue and there would be a left on to another road when they see police officers on foot in pursuit of other civilians. Tommy Weise thinks he sees where the people went who were getting away, gets it's not clear how long he's gone but . . . when he returns, Schwarz is in the back seat, apparently, assaulting.

(Id. at 95-96). He then stated that these notes "reminded me of that early issue where, based on Abner's account, the rear seat of the driver, at that particular time, I believe the driver was changed and it may have been Schwarz is driving, not showing which is the order." (Id. at 96). In other words, Figeroux claimed that it was his belief that between the two locations, the driver changed seats and another officer drove the vehicle. (Id.) He claimed that Louima had initially stated that the officers made two stops on the way to the precinct on the night of the incident. (Id.)

When asked to identify the basis of his belief that Louima's account regarding the switch in drivers had changed over time, Figeroux's testimony was extremely unclear. (Id. at 96-102). Indeed, again he could not identify a single conversation that he had had with Louima at which this had been discussed. (Id.)

The government prosecutors were questioned about various statements in the Figeroux affidavit and about Figeroux's testimony. Palmer denied the claim in Figeroux's affidavit that she had an "excellent relationship" with Figeroux. (P. Tr. at 53). She also denied that she ever called T&F to tell them she was concerned about CN&S influencing witnesses' testimony or preparing witnesses in ways which were improper. (Id. at 54-55). She did testify that she asked CN&S directly not to canvass the neighborhood and they complied. (Id. at 56).

When asked if she ever observed a change in Louima's testimony, Ms. Palmer adamantly responded: "[t]hat statement is affirmatively false." (Id. at 58). When asked if Louima's "account" of the incident had changed, Palmer responded, "[f]rom the very first day that we met with Abner in the hospital bed, he affirmatively told us that it was the driver. It was always the driver. The driver was Schwarz. He never changed or wavered in any of his dealings with us as to that fact." (Id. at 59). She also refuted Figeroux's testimony that there was a change in Louima's account as to the number of stops the officers made on the way to the precinct on the night of the incident. (Id. at 60).

Thompson also denied that he ever saw a change in Louima's recollection after the Tacopina meetings: "I believe Abner was consistent from the very beginning that it was the driver . . . who took him into that bathroom and held him down." (T. Tr. at 283-84). Louima never once told Thompson that it was Weise and not Schwarz. (Id. at 284). Mr. Thompson also denied that he ever contacted Figeroux or Thomas to express concern that Scheck was improperly influencing witnesses' testimony or "telling the witnesses what to say." (Id. at 277-78). He testified that he may have spoken to Thomas about the fact that people were being interviewed, "without letting [the government] have a first shot at them," but he did not accuse them of "trying to influence what [the witnesses] were saying." (Id. at 279). He did not have any evidence to suggest that CN&S continued to interview people after being asked not to by the U.S. Attorney's Office. (Id. at 280).

Mr. Vinegar testified that he first saw paragraph 14 of the Figeroux Affidavit in late March or early April of 2002. (V. Tr. at 249). He testified that he "was very surprised" when he learned the substance of the affidavit "because to my knowledge and

understanding Mr. Louima had been consistent in all of the various statements that he made about the issue in the third sentence," regarding the second officer in the bathroom. (Id. at 250-51). According to Vinegar, who was familiar with all of Louima's prior testimony, Louima had been consistent throughout, always referring to the "driver." (Id. at 251). Vinegar testified that he never saw a change in Louima's testimony or statements that would support Figeroux's allegation that Louima changed his account. (Id. at 254-55).[82]

As a result of these allegations, Vinegar and his team "expended considerable effort investigating that allegation," first getting access to the affidavit from this Court, and then conducting interviews of numerous people, including Figeroux, Roper-Simpson, and a number of people from the District Attorney's Office. (Id. at 252). The government was also forced to litigate the circumstances behind the affidavit, resulting in Fischetti's taking the depositions of Figeroux and Roper-Simpson "literally days before the commencement of the trial proceedings." (Id. at 253). Vinegar testified: "So this allegation caused us a considerable amount of further investigative work at the time we were, again, between two and a half months to the eve of trial." (Id.)

There were also leaks to the press which caused the

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[82] Neufeld also was adamant in his conviction that there was "absolutely no change in Abner's testimony." (N. Tr. I at 123, 130-134). Even Roper-Simpson failed to support Figeroux's allegations. Indeed, during the fee hearing, Roper-Simpson testified that she never saw a change in Louima's testimony of what had occurred (R.S. Tr. I at 195), and that, apart from the Tacopina meetings, she had never discussed with either Thomas or Figeroux the alleged claim that Scheck was improperly meeting with witnesses and preparing them improperly. (Id. at 191-194).

government concern because "it was pretrial publicity of matters that [Vinegar] did not know . . . would ever be admitted into evidence," and because he believed the allegation by Figeroux was "false" and he had concern about false information in the media shortly before the trial. (Id. at 253-54). Vinegar also confirmed that insofar as there was any question as to who was in the bathroom with Louima, he did not have any information to suggest that the government's investigation had proceeded in the wrong direction. (Id. at 261).

DISCUSSION

CN&S contend that T&F, as well as Roper-Simpson, are not entitled to recover fees because they withdrew from the case without cause. (CN&S Post-Tr. Br. at 111). In the alternative, CN&S contend that T&F's discussion of client confidences and secrets in the press, without their client's authorization, constitute such a serious breach of T&F's ethical obligations as to warrant forfeiture of their fees.

T&F, on the other hand, contend that they were terminated from representation of the Louimas without cause, or, in the alternative, their withdrawal was justified by the "pervasive and unwarranted accusations of misconduct" directed at T&F by Louima and CN&S. (T&F Post-Tr. Br. at 49). Specifically, T&F contend that CN&S engaged in a concerted campaign to eliminate T&F from the case by a variety of means, including: (1) failing to advise T&F regarding the CN&S investigation; (2) failing to inform T&F of the CN&S meetings with Tacopina; (3) disparaging T&F to Louima; (4) "initially indulging Louima's efforts to blame [T&F] for 'inventing' the 'Giuliani time' statement, and then encouraging Louima to blame Figeroux for leaking Louima's retraction of the statement and related matters to the press" (T&F Post-Tr. Br. at

23); and (5) preventing T&F from speaking to Louima "after he had fired them." (Id.)

T&F assert that CN&S has continued in a "scheme" designed to discredit T&F in order to maximize CN&S' share of the fees, including CN&S' efforts during the fee hearing before this Court to promote "half-truths, distortions . . . and irrelevancies," including the claim that T&F voluntarily resigned from the case. (Id. at 3). T&F contend that not only do CN&S lack standing to raise any purported breaches of duty by T&F to Louima (Id.), but that the only misconduct warranting the forfeiture of fees was perpetrated by CN&S in trying to drive T&F from the case. T&F assert that they are entitled to receive 100% of the fees as a result of CN&S' own unethical conduct in the case. (Id. at 74-75).

A. Jurisdiction

As an initial matter, federal courts "have independent authority to regulate attorney admission and withdrawal, and ancillary to that, the authority to determine attorney's fee disputes and regulate attorney's fee liens." Rivkin v. A.J. Hollander & Co., Inc., No. 95 CV 9314, 1996 WL 633217, at *2 (S.D.N.Y. Nov. 1, 1996).[83] The "nature and extent of an attorney's lien[] is

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[83] It is also clear that the district court may refer a motion for attorney's fees to the magistrate judge. See Fed. R. Civ. P. 54(d)(2)(D). Pursuant to Fed. R. Civ. P. 72(b), the magistrate judge may enter a report and recommendation determining and fixing the amount of a charging lien. See Butler, Fitzgerald & Potter v. Sequa Corp., 250 F.3d 171, 177 (2d Cir. 2001); Rajaratnam v. Moyer, 47 F.3d 922, 924 n.5 (7th Cir. 1995); Estate of Connors v. O'Connor, 6 F.3d 656, 658-59 (9th Cir. 1993) (stating that it was error for magistrate judge to issue final order, rather than report and recommendation, on post-judgment fees motion); cf. Cohen v. N.Y. City Health & Hosp. Corp.,

controlled by federal law," Pomerantz v. Schandler, 704 F.2d 681, 682 (2d Cir. 1983), where, as here, the underlying action is brought pursuant to the Federal Civil Rights Acts, 42 U.S.C. §§ 1983, 1985, 1986 and 1988. See, e.g., Misek-Falkoff v. Int'l Bus. Machs. Corp., 829 F. Supp. 660, 663 (S.D.N.Y. 1993) (noting that issues relating to an attorney's lien are governed by federal law "certainly in a federal question case and perhaps in all cases in federal court").[84]

Thus, while the issues to be determined in this fee dispute are governed by state rules of attorney conduct and state laws regulating the relationship between an attorney and his or her client, this Court remains mindful of its responsibility to ensure that the policies underlying the federal statutes at issue in this case are observed. See Rivkin v. A.J. Hollander & Co., Inc., 1996 WL 633217, at *2 (noting that both the N.Y. statutory charging lien and the common law retaining lien "are recognized and followed in the federal courts, as a matter of state or federal law, unless a specific federal law alters the parties' rights"). The federal policy behind the civil rights statutes "is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights," Wyatt v. Cole, 504 U.S. 158, 161 (1992), and Congress specifically provided for the recovery of attorney's fees by the prevailing party in civil rights actions to encourage counsel to pursue

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No. 99 CV 3896, 2001 WL 262764, at * 1-2 (S.D.N.Y. March 16, 2001) (issuing final order regarding amount of charging lien without indication that the parties had consented to referral for all purposes to the magistrate judge).

[84] Even if this fee issue was not governed by federal law, this Court would have jurisdiction to rule on the dispute under the doctrine of supplemental jurisdiction. See Chesley v. Union Carbide Corp., 927 F.2d 60, 64 (2d Cir. 1991).

such actions. See Kerr v. Quinn, 692 F.2d 875, 877 (2d Cir. 1983) (holding that "[t]he function of an award of attorney's fees is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel"). Section 1988 confers broad discretion on the district court in determining whether to allow an award of attorney's fees, and what an appropriate award of fees should be in any given action. See Raishevich v. Foster, 247 F.3d 337, 344 (2d Cir. 2001). While the attorneys in this case do not seek an award of statutory fees from the defendants because a settlement with defendants was reached inclusive of fees, this Court has a duty to ensure that, in determining the allocation of fees, the policies behind the federal civil rights laws are not circumvented.

B. Attorney's Lien

When an attorney ceases to represent a client during the course of a proceeding, the attorney may seek to protect his right to fees either by invoking a retaining lien on the files of his client, see, e.g., Pomerantz v. Schandler, 704 F.2d at 683 (noting that "[i]t is settled that an attorney may claim a lien for outstanding unpaid fees and disbursements on a client's papers which came into the lawyer's possession as the result of his professional representation of his client"), or through the assertion of a statutory charging lien on any amounts recovered by the attorney's former client in the proceeding. See Casper v. Lew Lieberbaum & Co., Inc., No. 97 CV 3016, 1999 WL 335334, at *5 (S.D.N.Y. May 26, 1999).

Section 475 of the Judiciary Law of the State of New York provides the basis under which attorneys may assert their right to a lien upon the proceeds of their client's cause of action:

> From the commencement of an action . . . in any court . . . the attorney who appears for a party has a lien upon his client's cause of action . . . which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

N.Y. Jud. Law § 475 (McKinney); see, e.g., Itar-Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d 442, 448 (2d Cir. 1998); Cohen v. N.Y. City Health & Hosp. Corp., 2001 WL 262764, at *1; Caribbean Trading & Fidelity Corp. v. Nigerian Nat'l Petroleum Co., No. 90 CV 4169, 1993 WL 541236, at *3 (S.D.N.Y. Dec. 28, 1993). A lien created by Section 475 is fully enforceable in federal court "'in accordance with its interpretation by New York courts,'" Itar-Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d at 449 (quoting Chesley v. Union Carbide Corp., 927 F.2d at 67), and the Second Circuit has held that federal courts have the responsibility to exercise supplemental jurisdiction over an attorney's claim for a lien "'to protect its own officers in such matters as fee disputes.'" Id. at 444 (quoting Cluett, Peabody & Co., Inc. v. CPC Acquisition Co., Inc., 863 F.2d 251, 256 (2d Cir. 1988)).

An attorney's lien under Section 475 attaches "from the moment the action commences" and attaches not only to any judgment that the client may obtain but also to the proceeds of any settlement between the parties to the underlying action. See Caribbean Trading & Fidelity Corp. v. Nigerian Nat'l Petroleum

Co., 1993 WL 541236, at *4 (citing cases). The Second Circuit has also made it clear that "where a defendant settles with a plaintiff without making provision for the fee of the plaintiff's attorney, that attorney can in a proper case proceed directly against the defendant." Chesley v. Union Carbide Corp., 927 F.2d at 67.

The New York courts have, however, held that the charging lien provided for in Section 475 is confined to the "attorney of record" and "'is not broad enough to include counsel.'" Itar-Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d at 450 (quoting In re Sebring, 238 A.D. 281, 288, 264 N.Y.S. 379, 387 (4th Dep't 1933)); Cataldo v. Budget Rent A Car Corp., 226 A.D.2d 574, 641 N.Y.S.2d 122, 123 (2d Dep't 1996) (stating that "[t]he Court of Appeals has clearly stated that [Section 475] grants a lien to the 'attorney of record'"). In defining what qualifies counsel as "attorney of record," New York courts have held that the attorney must "appear" on behalf of the client "in the sense of participating in a legal proceeding on the client's behalf or by having his name affixed to the pleadings, motions, records, briefs, or other papers submitted in the matter." Ebert v. New York City Health & Hosp. Corp., 210 A.D.2d 292, 619 N.Y.S.2d 756, 757 (2d Dep't 1994); see also Cataldo v. Budget Rent A Car Corp., 226 A.D.2d at 574, 641 N.Y.S.2d 123; Cheng v. Modansky Leasing Co., Inc., 137 A.D.2d 781, 783, 525 N.Y.S.2d 328, 330 (2d Dep't 1988) (holding that "an attorney whose name nowhere appears in the pleadings, motion papers, affidavits, briefs or record in a plaintiff's action is not entitled to seek a . . . charging lien under [Section] 475"), rev'd. on other grounds, 73 N.Y.2d 454, 539 N.E.2d 570, 541 N.Y.S.2d 742

(1989).[85]

Indeed, the fact that an attorney has a retainer agreement "is insufficient to create a charging lien" under Section 475. Ebert v. New York City Health & Hosp. Corp., 210 A.D.2d at 292, 619 N.Y.S.2d at 757; see also Rodriguez v. City of N.Y., 66 N.Y.2d 825, 827-28, 489 N.E.2d 238, 23940, 498 N.Y.S.2d 351, 353 (1985) (holding that where the retained attorney hires a second attorney to act "of counsel" but the second attorney in fact handles all pleadings and the trial, the second attorney is considered counsel of record even though he had no direct retainer agreement with the client). On the other hand, the Second Circuit has held that there may be more than one attorney of record, and nothing limits an attorney who has a valid lien from seeking compensation simply because another attorney of record also appeared on behalf of the plaintiff. Itar-Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d at 452.

Even where an attorney is not found to be counsel of record and thus entitled to a charging lien under Section 475, the Second Circuit has noted that there are cases which support the proposition that such an attorney may nevertheless be an equitable assignee by virtue of an agreement between the attorneys. See Id. (discussing Woodbury v. Andrew Jergens Co., 69 F.2d 49, 50 (2d Cir. 1934), where the plaintiff had agreed to pay a percentage of the recovery to his attorneys, one of whom was not the attorney of record, yet that attorney nevertheless "'became by the law of New York an

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[85] See also Klein v. Eubank, 87 N.Y.2d 459, 462, 663 N.E.2d 599, 600, 640 N.Y.S.2d 443, 444 (1996) (stating that "under both the statute and our precedents, an attorney's participation in the proceeding at one point as counsel of record is a sufficient predicate for invoking the statute's protection").

equitable assignee of the cause of action pro tanto' though he had no charging lien for fees"). In these instances, it is not necessary for the attorney asserting an "equitable lien" to show that he has an agreement directly with the client; "'[i]t was sufficient that he was employed under the agreement made with [co-counsel], who acted, in making it, with the authority of [the clients], and on their behalf.'" Id. at 453 (quoting Harwood v. LaGrange, 137 N.Y. 538, 540, 32 N.E. 1000 (1893)). "Thus, the distinction between an 'attorney of record' and one who is 'of counsel' may be of little practical significance in cases where attorneys have agreed among themselves to share in the fruits of their combined labor." Id. at 452.

When the attorney's retainer agreement with the client assigns to the attorney a portion of the proceeds of the action, the attorney "acquires . . . a vested property interest which cannot subsequently be distributed by the client or anyone claiming through or against the client." People v. Keeffe, 50 N.Y.2d 149, 156, 405 N.E.2d 1012, 1015, 428 N.Y.S.2d 446, 449 (1980). The attorney's lien is enforceable by the court in which the action is pending, Id. (citing New York Judiciary Law § 475), and the outgoing attorney's fees will be considered a charge to be included within the fees of the incoming counsel. See Reubenbaum v. B&H Express, 6 A.D.2d 47, 50, 174 N.Y.S.2d 287, 291 (1st Dep't 1958).

In this case, T&F ceased representation of the Louimas before any papers were filed in this federal civil action. The Summons and Complaint were not issued and filed until August 6, 1998, over seven months after T&F's relationship with the Louimas ended. The only document filed in connection with the action that was signed by T&F was the Amended Notice of Claim, dated November 4, 1997. (Ex. 4). It is unclear whether this constitutes a "pleading" for purposes of asserting a lien. However, under the case

law, it is clear that T&F have a claim for fees as an "equitable lien" that arises under the fee sharing agreements entered into between T&F, CN&S, and the Rubenstein firm on October 6, 1997 and November 3, 1997. (Exs. 60, 2). In addition, if Roper-Simpson is found to have had an enforceable oral fee splitting agreement with Thomas and Figeroux,[86] to which Louima consented, she would be entitled to an equitable lien as well.

C. Termination of the Attorney - Client Relationship

CN&S contend that T&F voluntarily withdrew from the representation of the Louimas without cause, thereby forfeiting any right to claim a share of the fees in this action.

(1) Standards for Termination or Withdrawal

Under New York law, it is well established that "notwithstanding the terms of the agreement between them, a client has an absolute right, at any time, with or without cause, to terminate the attorney - client relationship by discharging the attorney." Campagnola v. Mulholland, Minion & Roe, 76 N.Y.2d 38, 43, 555 N.E.2d 611, 614, 556 N.Y.S.2d 239, 242 (1990); see also Dagny Mgmt. Corp. v. Oppenheim & Meltzer, 199 A.D.2d 711, 712, 606 N.Y.S.2d 337, 338 (3d Dep't 1993); Schwartz v. Jones, 58 Misc.2d 998, 999, 297 N.Y.S.2d 275, 276 (N.Y. Sup. Ct. 1969) (noting that "the client may discharge the attorney at any time with or without cause, while the lawyer may withdraw only for good reason"). When the client discharges her

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[86] See Roper-Simpson's Memorandum of Law, dated March 29, 2001 ("R.S. Mem.") at 10; see also Post Hearing Memorandum of Law of Casilda Roper-Simpson, dated April 21, 2003 ("R.S. Post-Tr. Br.") at 9. See discussion infra at 139-44.

attorney without cause, under New York law, the attorney is "entitled to recover compensation from the party measured by the fair and reasonable value of the services rendered, whether they be more or less than the amount provided in the retainer agreement executed by the party and his or her former attorney." Cohen v. New York City Health & Hosp. Corp., 2001 WL 262764, at *2. See also Cheng v. Modansky Leasing Co., Inc., 73 N.Y.2d at 457-58, 539 N.E.2d at 572, 541 N.Y.S.2d at 744.

However, if an attorney voluntarily withdraws from the case without cause, the charging lien is subject to forfeiture. See People v. Keeffe, 50 N.Y.2d at 156, 405 N.E.2d at 1015, 428 N.Y.S.2d at 449. The law is clear that when an attorney has been retained in a legal matter, he "cannot abandon the service of his client without justifiable cause, and reasonable notice." Tenney v. Berger, 93 N.Y. 524, 529 (1883). If he abandons the client prior to the termination of the proceeding "without just cause," the attorney forfeits the right to collect for services rendered. Id. at 529. See also Allen v. Rivera,[87] 125 A.D.2d 278, 280, 509 N.Y.S.2d 48, 50 (2d Dep't 1986) (noting "[i]f the defendant's withdrawal as counsel was unjustifiable, then he forfeited any right to recover damages for services rendered on the basis of quantum meruit, and also forfeited any retaining lien on the file").

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[87] In Allen, the attorney sought to terminate his representation because he was "under a misapprehension" of the amount of work that would be required in the case. The Second Department found that there were issues of fact requiring a trial as to whether the attorney's unilateral withdrawal was prompted by his own financial concerns, which would effectively constitute abandonment of his client, or whether he withdrew, as he claimed, because of the client's misconduct. 125 A.D.2d at 279-280, 509 N.Y.S.2d at 50.

Similarly, if an attorney is terminated for misconduct, the charging lien is forfeited. People v. Keeffe, 50 N.Y.2d at 156, 405 N.E.2d at 1015, 428 N.Y.S.2d at 449; Dagny Mgmt. Corp. v. Oppenheim & Meltzer, 199 A.D.2d at 712, 606 N.Y.S.2d at 338 (holding "'[w]here the discharge is for cause, [an] attorney has no right to compensation or a retaining lien, notwithstanding a specific retainer agreement'") (quoting Campagnola v. Mulholland, Minion & Roe, 76 N.Y.2d at 44, 555 N.E.2d at 614, 556 N.Y.S.2d at 242); Williams v. Hertz Corp., 75 A.D.2d 766, 767, 427 N.Y.S.2d 825 (1st Dep't 1980) (holding that "an attorney who is discharged for cause or misconduct has no right to the payment of fees"). Among other things, counsel's "interference with the client's right to settle [can] constitute[] misconduct sufficient to . . . warrant[] discharge for cause and forfeiture of its fee." Dagny Mgmt. Corp. v. Oppenheimer & Meltzer, 199 A.D.2d at 713, 606 N.Y.S.2d at 339.[88] The burden rests with the client to demonstrate that there was just cause to terminate the attorney-client relationship. Casper v. Lew Lieberbaum & Co., Inc., 1999 WL 335334, at *6.

However, "attorneys who terminate the attorney-client relationship for just cause continue to be entitled to enforce their liens." Klein v. Eubank, 87 N.Y.2d at 462, 663 N.E.2d at 600, 640 N.Y.S.2d at 444; see also Kahn v. Kahn, 186 A.D.2d 719, 720, 588 N.Y.S.2d 658, 659 (2d Dep't 1992) (noting that "[w]here an attorney's withdrawal from a case is justifiable, the attorney is entitled to recover for services rendered on the basis of

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[88] Although not specifically argued by CN&S here, this Court notes that the various public disclosures by T&F during the course of settlement negotiations in this case created problems for the settlement process and prompted the issuance of a gag order when T&F refused to voluntarily refrain from speaking to the press.

quantum meruit"); Schwartz v. Jones, 58 Misc.2d at 999, 297 N.Y.S.2d at 276 (holding that "an attorney is entitled to be paid when discharged without cause or he withdraws with sufficient reason"). Even a disbarred lawyer has been held to be entitled to fees for services rendered prior to the disbarment, where the misconduct for which he was disbarred did not relate to the case. See Schwartz v. Jones, 58 Misc.2d at 999, 297 N.Y.S.2d at 276 (citing Tiringer v. Grafenecker, 38 Misc.2d 29, 30, 239 N.Y.S.2d 567 (2d Dep't 1962)).

This is because "[a]ttorney-client relationships frequently end because of personality conflicts, misunderstandings or differences of opinion having nothing to do with any impropriety by either the client or the lawyer." Klein v. Eubank, 87 N.Y.2d at 463, 663 N.E.2d at 601, 640 N.Y.S.2d at 445. Indeed, in some instances, the attorney offers to withdraw "to avoid embarrassment, avert further conflict, . . . or simply save the client from the discomfort of having to fire the attorney," while in other cases, the client asks his attorney to withdraw. Id. Where there is no evidence of misconduct, no discharge for cause, and no "abandonment" by the attorney, the New York Court of Appeals has held that "[a] rule making the charging lien unavailable to attorneys who voluntarily withdraw would introduce a strong economic deterrent" to the amicable settlement of these fee disputes and "rather than encouraging attorneys to bow out graciously," the rule would provide an incentive to the attorney to stay on in order to protect his right to fees. 87 N.Y.2d at 463-64, 663 N.E.2d at 601.

Under the Code of Professional Responsibility,[89] "a lawyer

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[89] The Disciplinary Rules of the Code of Professional Responsibility have been jointly adopted by the Appellate Divisions of the

may withdraw from representing a client if . . . [t]he client . . . renders it unreasonably difficult for the lawyer to carry out employment effectively." Disciplinary Rule ("D.R.") § 2-110(c)(1)(d), N.Y. Comp. Codes R. & Regs. tit. 22 § 1200.15.[90] See also Casper v. Lew Lieberbaum & Co., Inc., 1999 WL 335334, at *4. Where there is a history of nonpayment by the client, see Galvano v. Galvano, 193 A.D.2d 779, 780, 598 N.Y.S.2d 268, 269 (2d Dep't 1993), or where the client makes representation "unreasonably difficult," see Bankers Trust Co. v. Hogan, 187 A.D.2d 305, 598 N.Y.S.2d 338, 339 (1st Dep't 1992), an order of withdrawal is appropriate. See Mars Productions, Inc. v. U.S. Media Corp., 198 A.D.2d 175, 176, 603 N.Y.S.2d 487, 488 (1st Dep't 1993). Thus, an attorney may properly withdraw from representation if a client fails to communicate with the attorney, see Furlow v. City of New York, No. 90 CV 3956, 1993 WL 88260, at *2 (S.D.N.Y. Mar. 22, 1993), or there is "an irreconcilable conflict between [the] attorney and client." Generale Bank, New York Branch v. Wassel, No. 91 CV 1768, 1992 WL 42168, at *1 (S.D.N.Y. Feb. 24, 1992); see also Casper v. Lew Leiberbaum & Co., Inc., 1999 WL 335334, at *5; Hallmark Capital Corp. v. The Red Rose Collection, Inc., No. 96 CV 2839, 1997 WL 661146, at *3 (S.D.N.Y. Oct. 21, 1997); Cosgrove v. Fed. Home Loan Bank of New York, No. 90

State of New York and are binding upon attorneys practicing in New York. See N.Y. Comp. Codes R. & Regs., tit. 22 §§ 603.2, 691.2, 806.2, 1022.7.

[90] A determination that a withdrawal is permissible for an attorney who has appeared on behalf of a client before a court is distinct from a finding that any termination was or was not "for cause" for purposes of that attorney's right to compensation. See, e.g., Casper v. Lew Lieberbaum & Co, Inc., 1999 WL 335334, at *5 (granting motion to withdraw based on irreconcilable conflict but finding that discharge was not "for cause" for purposes of fee determination).

CV 6455, 1995 WL 600565, at *2 (S.D.N.Y. Oct. 12, 1995).

Irreconcilable differences between counsel and his client based on the client's behavior, including "insults, lying, foul language, accusations of unprofessional behavior, lack of cooperation, and failure to communicate," have been found to constitute a justifiable basis for terminating the attorney-client relationship, where the relationship has "so irretrievably broken down" that it cannot be repaired. Casper v. Lew Lieberbaum & Co., Inc., 1999 WL 335334, at *2. See also Itar-Tass Russian News Agency v. Russian Kurier, Inc., No. 95 CV 2144, 1999 WL 58680, at *2 (S.D.N.Y. Feb. 4, 1999) (holding that a "breakdown in communication between [counsel and client] plainly constitutes just cause for withdrawal").

Withdrawal under the rules is also permissible if the "client renders it unreasonably difficult for the lawyer to carry out employment effectively," by hiring new or additional counsel who interferes with the strategies of the original attorney. Joseph Brenner Assocs., Inc., v. Starmaker Entm't, Inc., 82 F.3d 55, 57 (2d Cir. 1996) (citing N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.15(c)(1)(iv)) and finding withdrawal justified where the initial attorney perceived new counsel's position to be that of a "'back-seat driver'"). In Lasser v. Nassau Community College, the original attorney was required by his client to get approval for all actions in the case from another attorney. 91 A.D.2d 973, 974, 457 N.Y.S.2d 343 (2d Dep't 1983). The court found that "[s]uch a requirement . . . was tantamount to being superseded by another attorney," and held that the attorney's fee should be determined at the conclusion of the litigation. Id. See also Goldman v. Rafel Estates, Inc., 269 A.D. 647, 648-49, 58 N.Y.S.2d 168, 170-71 (1st Dep't 1945) (finding withdrawal justified where the client "manifested a lack of confidence in [his attorney] by having another

attorney supersede him in related matters," and holding that withdrawal under these circumstances did not amount to a forfeiture of his retaining lien).

Similarly, in Tenney v. Berger, the client retained counsel in reference to the probate of the will of Cornelius Vanderbilt. 93 N.Y. at 526. Thereafter, the client, without consulting the first attorney, hired another attorney and placed the first attorney in a subordinate position to the newcomer. Id. at 530-31. The court noted first that:

> The client would certainly have no right, against the protest of the attorney, to introduce as counsel in the case a person of bad character, or of much inferior standing and learning - - one not capable of giving discreet or able advice. It would humiliate an attorney to sit down to the trial of a cause, and see his case ruined by the mismanagement of counsel.

Id. at 530. The court continued by noting that since the relationship between attorney and co-counsel is of "a delicate and confidential nature," "professional etiquette" suggests that the client should consult with the attorney so he can withdraw if he does not wish to associate with new counsel. Id. Thus, if new counsel or additional counsel interferes with an attorney's litigation strategy, that may be a justified basis for withdrawal. See Mars Productions, Inc. v. U.S. Media Corp., 198 A.D.2d at 176, 603 112 N.Y.S.2d at 488 (citing Lasser v. Nassau Community College, 91 A.D.2d at 974, 475 N.Y.S.2d at 343).

(2) Application

CN&S contend that T&F forfeited their right to claim fees

when they withdrew from representing Louima and left the meeting of lawyers on January 23, 1998, after telling Louima they "quit." T&F contend that they were fired by Louima or at the very least forced out in large measure by the actions of CN&S to discredit T&F and to drive a wedge between T&F and Louima.

Although the parties dispute exactly what was said at the final meeting of counsel on January 23, 1998, this Court, having considered all the evidence credits the testimony of Louima that he told T&F that he was giving them one last chance to listen to his instructions and to stop speaking to the press without his authorization. (L. Tr. at 39-40). Despite Mr. Neufeld's alleged statement to the press that T&F were "discharged" (Ex. 17), this Court credits the testimony of Mr. Scheck, Mr. Rubenstein, Mr. Neufeld and Mr. Cochran that when Thomas and Figeroux left the office that day after meeting privately with Louima, they announced that they were quitting. (S. Tr. I at 102; R. Tr. at 53; N. Tr. I at 106; C. Tr. I at 230). Moreover, while Roper-Simpson testified that Louima essentially forced T&F to choose between resigning or being fired, she was also the only witness to testify that the meeting was at Rubenstein's offices rather than those of CN&S. This factor, in addition to her conflicting testimony in other areas (see discussion infra at 139-44), leads this Court to discount her testimony in this regard. In sum, this Court finds, based on the credible evidence, that Louima did not fire T&F at that time but rather gave them one more chance to conform their behavior to his desire that all discussions with the press be cleared through him first.

T&F contend, however, that even if they said they were "quitting," they were in reality forced off the case by CN&S' efforts to alienate them from Louima. T&F argue that Louima's belief that they were the source of the leak of the retraction of the Guiliani time statement was not only unjustified but was fostered by CN&S in an

effort to have T&F removed from the case. T&F not only deny that Figeroux was the source of the January 20, 1998 Village Voice article that precipitated the January 23rd meeting, but they also argue that the article itself provides no basis to believe that Figeroux spoke to the press about this issue at that time. Specifically, the article describes its source of information regarding Louima's retraction of the Giuliani time statement as a "federal investigator" (Ex. 53 at 1-2), and, according to T&F, the statement attributed to Figeroux reflects his knowledge of the incident as of August 1997 at a time when he was "freely" communicating with the press and before Scheck's investigation had revealed that the Giuliani time statement originated not from Louima but from his brother, Jonas. (T&F Post-Tr. Br. at 32-33). T&F assert that CN&S deliberately misread the article and encouraged Louima to believe that the information was leaked by Figeroux in violation of Louima's explicit instructions. (Id.)

Apart from the fact that there is no evidence in the record to suggest that CN&S were responsible for the conclusion reached by Louima, it is not necessary for this Court to determine whether or not Figeroux was the source of the leaks to the press regarding Louima's retraction of the Giuliani time statement. Certainly, Louima had warned the lawyers many times long before the press reports in November, December and January that they were to clear press statements with him first. There was sufficient evidence for a reasonable person in Louima's position to conclude that T&F may have been responsible for leaking the story about the retraction of the Giuliani time remark. Not only did both Thomas and Figeroux have a previous relationship with Peter Noel (see F. Tr. I at 219; Thomas Tr. at 77), but Figeroux had previously spoken to him extensively (F. Tr. I at 219), and there were references to both their names in numerous articles as sources of what were clearly protected client secrets. (See, e.g., Exs. 27, 30). Indeed, Ms.

Palmer believed that T&F were the source of the leak as to the retraction of the Giuliani time statement. (P. Tr. at 30).

More important, however, while the prior leaks by T&F, coupled with their refusal to abide by Louima's press instructions and cooperate with co-counsel in pursuing the Louimas' case, would have warranted a discharge for cause, this Court finds that Louima did not fire them on January 23, 1998. Despite the continued leaks to the press and Louima's suspicion that T&F were responsible for those leaks, Louima nevertheless gave T&F one more chance to act in accordance with his instructions and remain as counsel in the case. Instead, T&F rejected those conditions and withdrew from further representation of the Louimas. This does not end this Court's inquiry, however. While CN&S contend that T&F withdrew without cause, essentially abandoning their client, T&F contend, on the other hand, that their withdrawal was justified by CN&S' other conduct and that, in essence, they were constructively discharged.

Among other things, T&F contend that CN&S deliberately alienated Louima from T&F by criticizing T&F not only with respect to the press leaks but on other grounds as well. In support of this claim, T&F contend that CN&S undermined their relationship with Louima by criticizing the adequacy of the monetary demand in the original Notice of Claim filed prior to CN&S' entry into the case. (F. Tr. III at 18; R.S. Tr. I at 144-45; but cf. N. Tr. I at 62; C. Tr. 28-31). However, the original Notice of Claim was signed only by Rubenstein. (Ex. 3). T&F did not sign the first Notice, only the second. (Ex. 4). Moreover, there is no evidence to support the claim that CN&S advocated for a higher amount or criticized T&F to Louima regarding the amount of the claim. Although Roper-Simpson testified that Cochran complained about the amount, she thought he "was sort of putting down

Mr.Rubenstein" (R.S. Tr. I at 144-45), and Rubenstein testified that he was in fact in favor of increasing the amount. (R. Tr. at 70). In any case, whatever criticism there may have been regarding the amounts requested in the Notices of Claim, the Amended Notice of Claim was filed on November 4, 1997, more than two months prior to T&F's withdrawal and clearly was not a precipitating factor that led to their resignation.

T&F also point to Neufeld's testimony that he had formed a negative impression of T&F even prior to signing the fee splitting agreement in November 1997, and that he "may" have shared that opinion with other members of the bar. (N. Tr. II at 156-57). Neufeld further testified that he may have shared these views with Louima on occasions where T&F were not present. (N. Tr. II at 26465). Apart from this possible statement by Neufeld, which he may or may not have shared with Louima, T&F can point to no other examples of negative statements by any of the CN&S attorneys to Louima or anyone else about T&F. By contrast, the testimony is replete with examples of negative and even anti-Semitic comments made by T&F about CN&S and the Rubenstein firm. (See, e.g., S. Tr. I at 34-35; L. Tr. at 28-30; C. Tr. I at 204; R.S. Tr. III at 30-32; Ex. 84).

Finally, T&F cite Scheck's investigation of the origin of the Giuliani time statement, arguing that CN&S attempted to place the blame on Figeroux for this statement, further alienating Louima from T&F. However, the testimony before this Court revealed no evidence that Scheck's investigation was biased in any way. Contrary to T&F's claims, this Court finds that Scheck conducted his investigation in a restrained and careful fashion; Scheck was not biased as T&F attempt to assert. In the first place, the Scheck investigation was instigated by the government based on Louima's voluntary revelation that the statement was never made by his

abusers. Ms. Palmer testified that when she asked Scheck to conduct the investigation, she did not want T&F informed. (P. Tr. at 42). Moreover, apart from Ms. Palmer's views, there was clearly a reason to suspect that Figeroux was involved with the creation of the Giuliani time statement since he was the first person to repeat it publicly. Nevertheless, rather than immediately accusing Figeroux, Scheck interviewed other potential sources first, finally determining that the Laurents were the source and that Figeroux's involvement was limited to a failure to verify the accuracy of the statement with his client before disseminating it to the press. In this regard, CN&S and the government were justified in being critical of Figeroux's actions.

Roper-Simpson also appears to contend that another reason T&F felt forced to withdraw was CN&S' release of information to the press blaming Figeroux for inventing the Guiliani time statement. Although she could not be specific as to the date,[91] Roper-Simpson described a meeting which she attended in Rubenstein's office where she, Figeroux, Cochran, Neufeld, Scheck, Rubenstein and Rynecki were present; Louima was in the room next door at the time. (R.S. Tr. I at 89-90). At this meeting, Roper-Simpson claims that Scheck was "blaming [Figeroux] for the Guiliani time statement." (Id. at 89). Cochran allegedly told the lawyers that according to Louima, Figeroux had told Louima the Guiliani time statement, to which Roper-Simpson responded and told the lawyers: "Mr. Louima is a liar. It didn't happen that way. And honestly, he is a piece of s__ [referring to Louima]." (Id. at

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[91] Mr. Scheck testified that the meeting at which he addressed the Guiliani time statement with Figeroux was sometime before Christmas 1997 (S. Tr. I at 84), which was several weeks before the first printed articles discussing Louima's retraction of the Guiliani time statement appeared in the Daily News and The New York Times on January 15, 1998. (See Exs. 35, 36).

90, 93). According to Roper-Simpson, the next day, she received a phone call from Thomas, informing her that 1010 WINS was reporting that Figeroux was being accused of coming up with the Guiliani time statement. (Id. at 90-92, 151-154; R.S. Tr. III at 159-160). However, later in her testimony, Roper-Simpson changed her account, stating that she heard this report on the radio after The Village Voice article dated January 20, 1998 was released. (R.S. Tr. I at 154; Ex. 53). Apart from the absence of any evidence to corroborate Roper-Simpson's claims regarding the 1010 WINS report, none of the printed articles blame Figeroux for making up the phrase, nor do any of these articles attribute any such accusations to CN&S. (Exs. 35, 36, 53).

Given the lack of any evidence to corroborate Roper-Simpson's claim about the alleged 1010 WINS report, the Court finds no basis to believe that CN&S leaked information to the press blaming Figeroux for the Guiliani time statement, and thus this alleged misconduct on the part of CN&S would not justify T&F's withdrawal from the case.[92]

Having thoroughly examined the record, this Court does not find any credible evidence to support T&F's claim that CN&S were engaged in a concerted effort to alienate Louima from T&F. Although T&F could perhaps argue that their withdrawal was justified by Louima's decision to hire CN&S as new counsel, and T&F's sense that they were being superseded by these new attorneys, see Joseph Brenner Assocs., Inc. v. Starmaker Entertainment, Inc., 82 F.3d at 57; Goldman v. Rafel Estates, Inc., 26 A.D. at 648-49, 58 N.Y.S.2d at 170-71, here they entered into

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[92] The Court also notes that it was not until her testimony in the fee proceeding that Roper-Simpson ever raised this claim. (R.S. Tr. III at 167).

a fee sharing agreement with the new attorneys, agreed that Thomas would be the "lead" attorney for purposes of public perception, and acquiesced in the relationship, working with the new attorneys for more than four months before withdrawing from the case. Moreover, apart from CN&S' failure to inform and include T&F in the Tacopina meetings,[93] there is no credible evidence to suggest that CN&S interfered with T&F's strategies on how to litigate the case. See Joseph Brenner Assocs., Inc. v. Starmaker Entertainment, Inc., 82 F.3d at 57. Rather, the evidence clearly demonstrates that it was Louima who interfered with T&F's strategy to litigate the case in the press, instituting a requirement that T&F clear press statements with him. This Court further finds, based on Ms. Palmer's testimony and the testimony of Mr. Neufeld and Mr. Scheck, which this Court credits, that the CN&S lawyers made an effort, despite the overt hostility shown by T&F, to forge a working relationship that would benefit the Louimas. Neufeld clearly made an effort to consult with T&F regarding Louima's treatment, the hiring of experts, the retention of the Walker Investigative Agency and various contacts with organizations that might provide assistance to the pattern and practice investigation. Similarly, Figeroux originally participated with Scheck in representing Louima in the course of Louima's dealings with the government and worked with Scheck and on his own in dealing with the various witnesses who were friends and family members of the Louimas.

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[93] To the extent that T&F attempt to argue that CN&S' failure to inform them of the Tacopina meetings in violation of the retainer agreement was a basis for justifying their withdrawal, this Court finds that T&F did not become aware of the Tacopina meetings until long after the January 23, 1998termination and thus, the Tacopina meetings could not have been considered by T&F at the time they withdrew as counsel. (See discussion infra at 173-74).

At some point along the way, however, there was clearly a breakdown in the relationship. Figeroux stopped attending the debriefing sessions with the government, and the hostility felt by T&F toward the other lawyers, which was so evident during the meeting at which the lap-top incident occurred, began to be discussed in the press. (See, e.g., Exs. 27, 30). The increasing deterioration of the relationship between counsel culminated in the investigation by Scheck of the origin of the Giuliani time statement.

There is no question that, by January 23, 1998, the relationship between T&F and Louima and the other attorneys had "so irretrievably broken down" that it was impossible for CN&S and T&F to work together as a cohesive team. Casper v. Lew Liberbaum & Co., 1999 WL 335334, at *2. While, as the Court of Appeals stated in Klein v. Eubank, "personality conflicts, misunderstandings, [and] differences of opinion," may sometimes justify an attorney's withdrawal, 87 N.Y.2d at 463, 663 N.E.2d at 601, 640 N.Y.S.2d at 445, here the conflict was almost entirely attributable to the conduct of T&F. In addition to repeatedly leaking information to the press, including comments highly critical of Louima's family (see, e.g., Exs. 27, 30), Thomas and Figeroux had increasingly refused to cooperate with CN&S, thereby impeding the progress of Louima's lawsuit. T&F's attitude toward their co-counsel was exemplified by their conduct during the "laptop incident," when they were overtly hostile toward the other attorneys. T&F's conduct at this meeting was indicative of their behavior from the beginning of their joint representation of Louima.

Therefore, while by January 23, 1998 the relationship between T&F and CN&S had soured, and T&F had lost the trust of their client, these circumstances had been caused in large measure by T&F's conduct. Thus, T&F cannot rely on the poor state of their relationship with co-counsel to justify arture. Good

cause to terminate the attorney-client relationship cannot be provided by the misconduct of the attorney. While Louima would have had good cause to terminate T&F on January 23, 1998, their withdrawal in advance of termination does not salvage their right to compensation. Therefore, this Court respectfully recommends that T&F be denied any share of fees in this litigation.

However, if the district court disagrees with this Court's finding that T&F withdrew from further representation of the Louimas, or that such withdrawal was without good cause, then, as set forth below, T&F would be entitled to an award of fees. In order to assist the district court in its analysis, this Court will set forth, in the alternative, the basis for and amount of such an award.

D. Misconduct by T&F

In addition to arguing that T&F are not entitled to share in the legal fees due to their withdrawal without cause, CN&S also contend that T&F forfeited any right to fees because they violated the rule of client confidentiality as set forth in D.R. 4-101, by disseminating client confidences and secrets both before and after they ceased their representation of the Louimas. (CN&S Post-Tr. Br. at 113-114).

(1) Standing

In response, T&F and Roper-Simpson contend first that CN&S have no standing to raise the issue of T&F's alleged breach of the Disciplinary Rules. Citing the Restatement (Third) Law Governing Lawyers § 6, T&F argue that "[tactical deployment of the disciplinary rules . . . is highly disfavored," and the fact that a disciplinary rule may provide a basis for sanctions against an attorney "'does not imply that an antagonist in a collateral

proceeding or transaction has standing to seek enforcement of the Rule.'" (T&F Mem. at 53 (quoting Restatement (Third) Law Governing Lawyers § 6)). Therefore, T&F contend that CN&S have no standing to seek a reduction in fees based on purported breaches of the ethical duties owed by T&F to Louima. (T&F Post-Tr. Br. at 55).

None of the parties have identified any case law directly on point dealing with a fee dispute between attorneys who are signatories to a fee-splitting contingency fee agreement where one attorney is accused of ethical violations. The cases cited by T&F for the proposition that only the client has a right to assert a claim based on an alleged violation of the disciplinary rules are inapposite. See, e.g., Itar-Tass Russian News Agency v. Russian Kurier, Inc., 1999 WL 58680, at *9 (holding that co-plaintiffs who are not liable for attorneys' fees could not move for sanctions against plaintiff's counsel for a violation of the Disciplinary Rule governing fee splitting since co-plaintiff had not been damaged by the fee splitting arrangement); Heard v. Bonneville Billing & Collections, 216 F.3d 1087 (table) (10th Cir. 2000) (holding that plaintiff lacked standing to challenge a fee splitting arrangement between defendant and defendant's counsel); Pee & Hazard v. Jones, 33 Conn. L. Rptr. 72, 77 (Conn. Super. Ct. 2002) (excluding testimony of legal ethics expert in dispute between former law partners).

None of these cases deal with a dispute such as the one here, where the Louimas executed a retainer agreement dated November 3, 1997 with all of the attorneys,[94] providing that the various attorneys would be entitled to share a one-third legal fee resulting from the joint efforts of all the attorneys. (Ex. 2). In this

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[94] Roper-Simpson was not a party to this agreement.

agreement, the clients agreed to joint representation by the attorneys, and agreed to a contingency fee of one-third to be divided equally between the firms of CN&S, Rubenstein & Rynecki, and T&F. (Id.)

Under the Disciplinary Rules, the division of the one-third fee portion is expressly left to the attorneys to decide. See D.R. 2-107(A)(1), N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.12 (requiring only that the client be informed and "consent[] to the employment of the other lawyer after a full disclosure that a division of fees will be made"); see also Carter v. Katz, Shandell, Katz & Erasmous, 120 Misc.2d 1009, 1018, 605 N.Y.S.2d 991, 997 (N.Y. Sup. Ct. 1983) (holding that "[a] Any further elaboration or specificity regarding the exact arrangement between the collaborating attorneys is not ethically mandated by [D.R. 2-107]").

Clearly, the Louimas could easily file an application with this Court seeking to have T&F's share of the fees forfeited based on the very same breaches of the Disciplinary Rules that were examined in this fee proceeding. In this case, CN&S and the Rubenstein firm essentially stand in the shoes of the Louimas in asserting that T&F's violations of their ethical obligations to their clients were sufficiently egregious to warrant forfeiture of T&F's right to a share of the fees. To hold otherwise would mean that an attorney who agrees to split a contingency fee with another attorney could blatantly commit untold breaches of the ethical rules to the detriment of the client or withdraw without cause and rest on his laurels while the remaining attorney labors successfully on behalf of the client. If the remaining attorney had no standing to raise these issues of breach in the context of a fee sharing agreement, he would have no recourse to object when the breaching attorney demanded his equal share of the fee. While T&F is correct that, in the absence of the fee splitting agreement among counsel, any fees forfeited by

T&F would be returned to the client, here T&F's violations do not vitiate the agreement that the Louimas have with their other counsel. Collectively, the attorneys are still entitled to receive one-third of the total settlement, and any portion of the fees forfeited by T&F would still be considered to be part of the fee amount to be divided among the remaining counsel. Thus, based on the equities, and the absence of any authority to the contrary, this Court concludes that CN&S have standing to raise alleged ethical breaches by T&F that would otherwise be asserted by the Louimas in the absence of the fee-sharing agreement. (See, e.g. Ex. 2; see also Ex. 60).

(2) Confidences and Secrets

It is well established that "the role of a lawyer vis a vis the interests of his client is categorized as that of fiduciary trustee." Condren v. Grace, 783 F. Supp. 178, 182 (S.D.N.Y. 1992) (citing Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976)). See also Hafter v. Farkas, 498 F.2d 587, 589 (2d Cir. 1974). This relationship of trust requires an attorney "to exercise the highest degree of good faith, honesty, integrity, fairness and fidelity," Condren v. Grace, 783 F. Supp. at 182, and "precludes the attorney from having personal interests antagonistic to those of his client." Id.

D.R. 4-101(B) provides that a lawyer shall not reveal a "confidence" or "secret" of a client, or use a confidence or secret of his client to the disadvantage of the client or to provide an advantage to himself, except under certain limited circumstances. D.R. 4-101(B), N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.19. D.R. 4-101(A) defines "'[c]onfidence' [as] information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of

which would be embarrassing or would likely to be detrimental to the client." D.R. 4-101(A), N.Y. Comp. Codes R. & Regs., tit. 22 §1200.19. As one court noted: "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law." First Fed. Savings & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 557, 564 n.12 (S.D.N.Y. 1986).

It is clear that a lawyer "should not use information acquired in the course of the representation of a client to the disadvantage of the client" nor should the lawyer use such information for his own purposes "except with the consent of his client after full disclosure." Ethical Consideration ("E.C.") 4-5. Moreover, there is a related Disciplinary Rule which prohibits an attorney in a civil matter from "mak[ing] an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in that matter." D.R. 7-107(A), N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.38.

This obligation to protect a client's confidences and secrets continues even after the attorney-client relationship has terminated. See E.C. 4-6. "Attorneys owe continuing duties of both [and] [t]he Code of Professional Responsibility imposes a continuing obligation on attorneys to protect their clients' confidences and secrets." Brown & Williamson v. Chesley, No. 01 CV 117050, 2002 WL 31940719, at *1 (N.Y. Sup. Ct. Dec. 18, 2002) (citation omitted). D.R. 2-110(A)(2) provides that where withdrawal from representation is permitted, a lawyer must take all reasonably foreseeable steps to prevent post-withdrawal prejudice to the client.

D.R. 2-110(A)(2), N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.15. Thus, even after the representation of a client has ceased, an attorney may not reveal information confided by the former client to the client's disadvantage. Brown & Williamson v. Chesley, 2002 WL 31940719, at *1.

CN&S contend that T&F made numerous public disclosures of secrets and confidences of Louima without his approval and contrary to his express orders, in violation of these Disciplinary Rules. As a consequence, CN&S argue that T&F have forfeited their right to any fees in this action.

(a) The Disclosures of Client Secrets

T&F argue that there is no evidence that there were any disclosures of Louima secrets that violated Louima's instructions, either prior to January 1998 or during the events immediately prior to the cessation of T&F's representation. T&F further argue that to the extent Thomas or Figeroux made statements after the attorney-client relationship ended, those disclosures were permitted by DR 4-101(C)(4).

Based on the newspaper articles offered into evidence by CN&S, this Court finds there are numerous instances in which either Thomas or Figeroux is quoted relating information about the case that constitutes client secrets. These disclosures were not authorized by Louima. Indeed, it is clear that Louima instructed the attorneys early on not to speak to the media without his approval. (C. Tr. I. at 197; L. Tr. at 26-28). Moreover, Figeroux conceded that T&F was "talking to the media throughout," without specific permission from Louima. (F. Tr. I at 197).

Perhaps the quintessential example of a press

communication in violation of an attorney's ethical obligations under D.R. 4-101(B) was Figeroux's statements to Ms. Brenner which appear in the December 1997 issue of Vanity Fair. Based on the testimony before this Court, this Court finds that these statements were made at a time when Louima had made it clear that all press contacts must be cleared through him. Indeed, Figeroux conceded that he did not have permission to speak to the press in connection with his Vanity Fair interview. (F. Tr. I at 197). It also cannot be disputed that many of the things revealed in the article qualify as client secrets. Figeroux, when questioned about this article, conceded as much. While Figeroux did not deny making these statements - - he simply could not recall if he made them - - (Id. at 206-10), there is no possible justification for some of the things he said, including calling the Louima family "diseased" and telling the reporter that "'[i]t is all about money where this family is concerned.'" (Ex. 27). Not only are these disclosures a blatant violation of D.R. 4-101(B), but they are also a violation of D.R. 7-107(A) in that they are extrajudicial statements made publicly and to the press that had a substantial likelihood of prejudicing the criminal proceedings. These statements raised questions about Louima's motives and, consequently, created credibility problems for Louima.

With respect to the press statements made by T&F after they ceased to represent Louima, the majority of these statements were purportedly made by Thomas, including comments that Louima's case was being handled "'as a case about money'" (F. Tr. II at 21; Ex. 16), his statement that Cochran "'has a significant amount of baggage'" and suffers from the perception that he is "'in some ways dishonest'" (Ex. 17), and Thomas' "fear[ ] that Cochran's team will not take the high road." (F. Tr. II at 42; Ex. 31). Perhaps most disturbing is the quote by Thomas that T&F resigned because "Neufeld was behind an attempt to prevent

[T&F] from condemning 'unethical behavior' by the O.J. Simpson 'dream team[,]'" thereby suggesting that unethical behavior by CN&S had in fact occurred. (Ex. 19).

Although Figeroux claimed to have had no knowledge of what Thomas was saying to the press (F. Tr. II at 6, 36), and Thomas unfortunately is deceased and therefore unable to deny making these statements, it is undisputed that no retraction of these or any other statements attributed to either Thomas or Figeroux ever appeared in print. Nor do T&F assert that these statements were authorized by Louima. Clearly, these statements fall within the prohibition embodied in the Disciplinary Rules. In fact, even Mr. Figeroux conceded that these statements constituted proteeted client secrets. (F. Tr. II at 18-19, 21-22, 25, 27, 40-47).

(b) Justifications for Disclosures

In arguing that the disclosures in this case were warranted, T&F rely on D.R. 4-101(C)(4), which authorizes an attorney to reveal "[c]onfidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer . . . against an accusation of wrongful conduct." D.R. 4-101(C)(4), N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.19. This Rule recognizes the principle, long accepted by the common law, that a lawyer has the right to disregard the privilege of a current or former client and to disclose otherwise protected confidences when suing the client to collect a fee. See Nakasian v. Incontrade, Inc., 409 F. Supp. 1220, 1224 (S.D.N.Y. 1976). The rationale behind justifying the invasion of the privilege was that "it would be a 'manifest injustice' to 'permit [] a client to use the privilege to his attorney's disadvantage.'" First Fed. Savings & Loan of Pittsburgh v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. at 561 (quoting Levine, Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit &

Protection, 5 Hofstra L. Rev. 783, 793 (1977)).

The other situation in which disclosure has traditionally been justified is when the attorney is called upon to defend himself in a suit for malpractice, see, e.g., Finger Lakes Plumbing & Heating, Inc., v. O'Dell, 101 A.D.2d 1008, 476 N.Y.S.2d 670, 671 (4th Dep't 1984), or where his competence is challenged by his client as in a claim of ineffective assistance of counsel by a convicted criminal defendant. See, e.g., United States ex rel Richardson v. McMann, 408 F.2d 48, 53-54 (2d Cir. 1969), vac. on other grounds, 397 U.S. 759 (1970). The rationale behind allowing disclosure in this type of a factual dispute between a client and his attorney is that "[t]o the extent that the client initiates the dispute, he can be said to have put in issue his communication with his attorney and thus waived his right to the protection of the privilege." First Fed. Savings & Loan Ass'n. of Pittsburgh v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. at 561 (citing cases); see also Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190, 1194-95 (2d Cir.), cert. denied, 419 U.S. 998 (1974) (finding that attorney had right to disclose client confidences to defend himself in civil suit).

Disciplinary Rule 4-101(C)(4) is broader than the common law in that it deals not only with confidential attorney client communications but secrets as well. D.R. 4-101(C)(4), N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.19; see also First Fed. Savings & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. at 563. Under the Rule, courts have held that even where an attorney's conduct is not directly challenged by his client, that attorney may disclose privileged information if necessary to defend himself against criminal charges, see, e.g., United States v. Amrep Corp., 418 F. Supp. 473, 474 (S.D.N.Y. 1976) (permitting disclosure where attorney is defendant); Application of Friend, 411 F. Supp. 776, 777 (S.D.N.Y. 1975) (permitting

attorney to produce privileged documents to grand jury), or in the context of a civil proceeding where the attorney is being sued by someone other than his client. See, e.g., Rosen v. Nat'l Labor Relations Bd., 735 F.2d 564, 576 (D.C. Cir. 1984); Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d at 1194-95.

In Meyerhofer v. Empire Fire & Marine Insurance Co., the attorney, who had represented an insurance company in a public offering, was named as a defendant in a securities fraud class action. 497 F.2d at 1192-93. To demonstrate his innocence in the alleged fraudulent conduct, the attorney provided an affidavit to plaintiffs' counsel disclosing certain client secrets and confidences which led plaintiffs to drop their claims against the attorney. 497 F.2d at 1194-96. The Second Circuit, in concluding that the attorney's disclosures were justified under the circumstances, stated:

> The charge, of knowing participation in the filing of a false and misleading registration statement, was a serious one. The complaint alleged violation of criminal statutes and civil liability computable at over four million Under these circumstances [the attorney] had the right to make an appropriate disclosure with respect to his role in the public offering.

Id. The Court of Appeals, however, affirmed the lower court's order barring the attorney from disclosing any "material information" relating to his role in the transaction except at trial or during the course of discovery in the case. Id. at 1196.

In First Fed. Savings & Loan of Pittsburgh v. Oppenheim, Appel, Dixon & Co., the court was asked to resolve the propriety of disclosures by the former general counsel of Comark, a securities

dealer, in a suit brought by customers of Comark against Oppenheim, Appel, Dixon & Co., Comark's former auditors. 110 F.R.D. at 558-59. In considering whether an attorney who is named as a third party defendant in a civil proceeding has the right to invoke the "self defense" exception to the rule even when not sued by his own client, the court expressly recognized three reasons for an exception to the privilege under such circumstances, but made it clear that certain "procedural and substantive [limitations] . . . must be placed on its invocation." 110 F.R.D. at 566.

> First, if an attorney is sued for alleged misconduct in representing a client, it is self-evident that he has a compelling interest in being able to defend himself. Second, that interest may well outweigh the interest of the client in maintaining the confidentiality of his communications, particularly if disclosure of those communications will not imperil the legal interests of the Third, such disclosure will serve the truth finding function of the litigation process, and is thus consistent with the general principle of narrowly construing evidentiary privileges.

Id. at 565.

(c) T&F's Disclosures to the Press Were Not Warranted

With respect to the press statements made prior to January 1998, T&F contend that these statements were made prior to the time that Louima had issued his instructions to clear all statements with him, and thus "cannot be relied upon to establish a violation of the duty to maintain client secrets." (T&F Post-Tr. Br. at 59). T&F specifically refer to the December 1997 Vanity Fair article, which T&F contend contains only statements made by them "the Friday

before Labor Day'" or "August 29," prior to Louima's first press instruction, which they assert occurred "in or after September 1997." (Id. at 59, n.30). In addition, T&F contend that none of the press statements made prior to January 1998 divulged protected client secrets.

While this Court does not agree that Louima's first press instruction was not given until September 1997, in any event, T&F had an independent obligation to preserve their client's confidences and secrets even in the absence of any instruction from Louima. D.R. 4-101(C) does not require the client to request confidentiality as a prerequisite for the application of the Rule. The obligation to maintain a client's confidences and secrets is imposed automatically, and while it can be waived by the client, this Court finds that no such waiver occurred here. Indeed, T&F's disclosures prior to January 1998, which included statements denigrating Louima's family (see Ex. 27), violated T&F's obligation to maintain client confidentiality.

T&F attempt to justify their public statements made after January 1998 by claiming that they were "made to explain the firm's departure from the case, and defend [the attorneys] against the public charge that [they] had been fired because of Figeroux's complicity in inventing the 'Giuliani time' remark." (T&F Post-Tr. Br. at 61). T&F further contend in their Memorandum of Law that an accusation of misconduct need not be made in the form of a lawsuit or disciplinary proceeding in order to justify a response under subdivision (C)(4) of D.R. 4-101. (T&F Post-Tr. Br. at 62).

The cases cited by T&F, however, prove the opposite and clearly establish that the Disciplinary Rules do not permit an attorney to reveal client secrets to the press in the absence of a disciplinary action, or fee litigation, government investigation, or civil

suit in which the attorney could reasonably be called upon to defend himself from charges of misconduct. See First Fed. Savings & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co., 110 F.R.D. 559 (attorney named as third party defendant in civil suit); General Realty Assoc's. v. Walters, 136 Misc.2d 1027, 1029, 519 N.Y.S.2d 530, 532 (N.Y. Civ. Ct. 1987) (allowing attorney to testify as to communication with former client to impeach client's testimony regarding that communication).[95] Indeed, even when such charges or claims are pending, the press is not the appropriate forum in which an attorney may defend himself. Mere press reports regarding an attorney's conduct do not justify disclosure of a client's confidences and secrets even if the reports are false and the accusations are unfounded.

In an exhaustive review of the case law, Magistrate Judge Dolinger, in the First Federal case, explored the various circumstances in which disclosures by attorneys have been found to be warranted. He found that D.R. 4-101 "appears to encompass disclosure when the attorney is being sued by someone other than the client or, indeed, when an 'accusation' of misconduct has been leveled against the attorney, even if a suit has not been filed." 110

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[95] While the Civil Court's ruling in General Realty did allow an attorney to testify regarding a privileged communication in the absence of a pending or contemplated civil or criminal proceeding against that attorney, the sole case cited by the Court was Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190. In Meyerhofer, the attorney invoking D.R. 2-101(C)(4) was a named defendant in a civil suit. In any event, although not mentioned by the Court in General Realty, the former client in General Realty had placed the privileged communication at issue in her landlord-tenant dispute, thereby waiving the privilege as to that communication. In addition, T&F rely on Stirum v. Whalen, 811 F. Supp. 78, 84 (N.D.N.Y. 1993). However, in Stirum the attorneys seeking to disclose client confidences were named defendants in a civil action for fraud. Id.

F.R.D. at 562. However, this broad language, relied on by T&F, is purely dicta and nothing in the opinion suggests that an accusation in the press made by someone other than the client would justify disclosure. Indeed, in First Federal, the attorney was named as a third party defendant in a civil suit. None of the cases analyzed by Judge Dolinger support T&F's position that attorneys may divulge client secrets to respond to perceived attacks in private or in the press.

In summary, no authority has been cited to this Court, nor could any authority be found, which justifies the public comments of T&F in this case. First, at the time the statements were made, there was no fee proceeding pending in which T&F would have needed to or been authorized to make disclosures. Indeed, at the time some of the statements were made, the Louimas' civil complaint had not even been filed and there was certainly no settlement at that time from which T&F could arguably have made a claim for fees. Thus, there is no justification for T&F's press leaks under the provision of D.R. 4-101(C)(4) that allows disclosure of client confidences and secrets in a fee proceeding.

T&F contend that their statements in the press were defensive and argue that their disclosure of client secrets were necessary because neither CN&S, Louima or Louima's family "ever retract[ed] the false charge that [T&F] had been fired due to Figeroux's guilt in inventing the 'Giuliani time' comment." (T&F Post-Tr. Br. at 62).[96] Apart from the fact that there is no evidence

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[96] Figeroux contends that, contrary to the claims of CN&S, his repetition of the Giuliani time statement to the press does not warrant his forfeiture of fees because Figeroux simply had no reason to believe that Jonas would "invent a lie" or that Louima would thereafter ratify the statement to the press. (T&F Post-Tr. Br. at 21). T&F contend that it was

that such an accusation was ever made by CN&S or Louima, at the time that T&F made statements to the press, there was no pending proceeding, judicial or otherwise, in which T&F would have been required to defend themselves nor was any such proceeding contemplated. Indeed, there was never a formal allegation of attorney misconduct by the client in this case.

Of all of the articles addressed by T&F in their papers, none of them directly quotes either Louima or the CN&S lawyers as blaming Figeroux for the Giuliani time statement, nor is there any specific statement from Louima or CN&S criticizing T&F in any manner that would justify a response in violation of T&F's ethical obligation to maintain Louima's confidences and secrets. The first series of articles attribute statements to Thomas about the differences among counsel and indeed, Thomas raised the issue of the Giuliani time statement as early as January 28, 1998 without any apparent provocation from CN&S or Louima. (Ex. 18). The only article in which one of the CN&S lawyers is directly quoted simply quotes Neufeld as saying that T&F had been "discharged," a statement he now vehemently denies. (N. Tr. I at 113-14). Again, were this statement made in the context of a fee hearing or other proceeding asserting misconduct, T&F might have had the right to a limited reply.[97] In this context, however, where there was no fee

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Figeroux's trust in Louima and his family, coupled with Louima's failure to tell the truth, that led to the problems faced by Louima later during the criminal trials. (Id. at 21-22). Although the Court finds that Figeroux's repetition of the Guiliani time statement to the press without first confirming it with Louima was irresponsible and reckless, this incident alone would not, in this Court's view, justify a forfeiture of fees and the Court has not relied on this incident in reaching its recommendation here.

[97] In this regard, the Fifth Circuit has held that even where the client waived the privilege by suing his attorney for malpractice, the waiver

proceeding pending and no litigation in which T&F were called to defend themselves, their comments to the press were utterly unjustified and a blatant violation of their ethical obligations.[98] The fact that the press may have been speculating as to Figeroux's role in the Giuliani time statement[99] does not constitute the type of accusations contemplated by the Disciplinary Rules that warrant disclosures of client secrets.

Neither do any statements allegedly made by members of Louima's family warrant disclosure of client secrets. Although the Daily News article of January 28, 1998 quotes Samuel Nicolas as saying that Figeroux's use of the Giuliani time statement "'did raise some concerns'" (Ex. 14), clearly the Disciplinary Rules provide no exception to the requirement that confidences and secrets must be maintained when a client's family criticizes a lawyer outside of a judicial proceeding.[100] Similarly, the January 28, 1998 New York

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does not extend to all subsequent proceedings such as criminal charges in which the communications are relevant. See United States v. Ballard, 779 F.2d 287, 292 (5th Cir. 1986).

[98] T&F have also contended that their response was "restrained." (Transcript of Hearing on Oct. 16, 2002 at 9). Not only were T&F's statements to the press anything but restrained, but the suggestion to the press that there were "ethical" problems with the way the case was being handled prejudiced Louima individually, by criticizing not only the attorneys but Louima as well, and raising issues of his credibility that potentially prejudiced him in the criminal proceedings.

[99] Indeed, any diligent investigative reporter could have discovered that Figeroux was the first to repeat the Giuliani time statement publicly by doing a simple Lexis-Nexis search.

[100] T&F also point to a purported quote from Rubenstein in a January 28, 1998 Daily News article that the Giuliani time statement was the

Times article, which quotes an anonymous source on the discord between T&F and CN&S and states that the other attorneys had "lost confidence" in T&F (Ex. 13), does not justify T&F's reckless statements. Indeed, no reasonable interpretation of D.R. 4-101(C)(4) would allow an attorney to disclose client confidences and secrets to the press under any circumstances, much less those present in this case.

Thus, the only remaining question is whether T&F, by their conduct, should forfeit all or any portion of their fees as a consequence of these ethical violations. T&F contend that, even if an attorney breaches his ethical obligations, courts have held that the attorney does not necessarily forfeit the fees that he earned for services already rendered.

(3) Forfeiture of Fees

If an attorney breaches his or her fiduciary responsibility to a client, a denial of attorney's fees may be an appropriate sanction. Condren v. Grace, 783 F. Supp. at 185 (noting "[w]ithout question, case law addressing the topic of breach of an attorney's fiduciary duties to his client sanctions denial of legal compensation"); see also Silbirger v. Prudence Bonds Corp., 180 F.2d 917, 920-21 (2d Cir.), cert. denied, 340 U.S. 831 (1950); In re Estate of Winston, 214 A.D.2d 677, 625 N.Y.S.2d 927 (2d Dep't 1995) (holding that

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subject of a federal probe. (Ex. 14). While Rubenstein admitted that he had provided other information to the author of this article, Rubenstein denies making this statement, stating that the language was a mischaracterization of what he actually said. (R. Tr. at 89-91). Even if Rubenstein had made this statement, it does not invite response from T&F nor does it justify their statements to the press.

"'[a]n attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees for any services rendered'") (quoting Shelton v. Shelton, 151 A.D.2d 659, 542 N.Y.S.2d 719, 720 (2d Dep't 1989)).

Applying New York law, courts have held that even an attorney who is found guilty of champerty, see, e.g., Application of Kamerman, 278 F.2d 411, 413-14 (2d Cir. 1960), or engages in unconscionable overcharging, see, e.g., Newman v. Silver, 553 F. Supp. 485, 496-97 (S.D.N.Y. 1982), aff'd in part, remanded on other grounds, 713 F.2d 14 (2d Cir. 1983), does not forfeit his fee entirely, but rather is entitled to recover in quantum meruit. See In re Rosenman & Colin, 850 F.2d 57, 63-64 n.3 (2d Cir. 1988) (finding that an attorney's alleged failure to send monthly bills to his client in breach of a retainer agreement, even if true, does not justify complete forfeiture of fees); see also Mar Oil, S.A. v. Morrissey, 982 F.2d 830, 840 (2d Cir. 1993) (noting that "[t]he fact that an attorney has breached his fiduciary duty to his client [by withdrawing client funds from escrow without authorization] does not necessarily mean that he must forfeit fees for services he had already performed or would thereafter perform"); Olshan Grundman Frome Rosenzweig & Wolosky LLP v. Jeglitza, No. 00 CV 1140, 2000 WL 420557, at *3 (S.D.N.Y. April 18, 2000) (stating that "a violation of disciplinary rules does not necessarily relieve the client entirely from payment" but finding no violation based on the record developed thus far). "A lawyer forfeits his entire fee due to misconduct only where the misconduct relates to the representation for which the fees are sought." Decalator, Cohen & DiPrisco, L.L.P. v. Lysaght, Lysaght & Kramer, P.C., 304 A.D.2d 86, 91, 756 N.Y.S.2d 147,150 (1st Dep"t 2003).

T&F contend that a total forfeiture of fees in this case would be contrary to New York's general policy of disfavoring fee

forfeitures, particularly "'where there are other . . . sanctions for noncompliance.'" (T&F Post-Tr. Br. at 56) (quoting Benjamin v. Koeppel, 85 N.Y.2d 549, 553, 650 N.E.2d 829, 831, 626 N.Y.S.2d 982, 984 (1995)). In Benjamin, however, an attorney had sought payment of a fee based on his referral of a client in a real estate matter, but the defendant law firm refused to pay, claiming that because the attorney had failed to comply with the attorney registration requirements, payment of the fee would violate public policy. 85 N.Y.2d at 552, 650 N.E.2d at 830, 626 N.Y.S.2d at 983. In rejecting that argument, the court noted that the remedy -- total forfeiture of fees -- was "'wholly out of proportion to the requirements of public policy.'" 85 N.Y.2d at 556, 650 N.E.2d at 832, 626 N.Y.S.2d at 983 (quoting Rosasco Creameries v. Cohen, 276 N.Y. 274, 278, 11 N.E.2d 908, 909 (1937)).

In this case, CN&S contend that the ethical breaches committed by T&F both before and after they ceased representation of the Louimas are of a much more serious nature. "While the law abhors a forfeiture, this is not a case involving a mere technical breach of contract . . . but a gross breach of an attorney's professional and fiduciary duties to his client." A to Z Assocs. v. Cooper, 161 Misc.2d 283, 292, 613 N.Y.S.2d 512, 519 (N.Y. Sup. Ct. 1993) (citations omitted).

T&F argue that the authorities cited by CN&S in which an attorney's misconduct has resulted in a forfeiture of fees are not relevant here because in those cases, the attorneys' misconduct constituted a conflict of interest or amounted to a fraud, which "go to the heart of the attorney-client relationship." (T&F Post-Tr. Br. at 56). T&F maintain that "the basis for denying a fee in the conflict of interest cases is that the client did not get what the client agreed to pay for, i.e., conflict-free representation." (Id. at 56).

While it is true that the misconduct referred to in a number of cases cited by CN&S is based on the type of conflict that arises when an attorney divides his allegiance between two clients, see, e.g., Silbirger v. Prudence Bonds Corp., 180 F.2d at 920; Condren v. Grace, 783 F. Supp. at 185; In re Estate of Winston, 214 A.D.2d 677, 625 N.Y.S.2d 927; Shelton v. Shelton, 151 A.D.2d 659, 542 N.Y.S.2d at 720; here, the alleged disclosure of client secrets in violation of the Disciplinary Rules presents a conflict between the client's interests and the interests of the attorneys themselves, which is arguably a more serious violation. Although neither party has cited any cases directly on point in which an attorney, whether to preserve or advance his claim for fees, as CN&S suggest, or to defend his reputation, as T&F claim, revealed client confidences and secrets to the press without authorization, this Court finds that this conflict between the attorneys' interests and those of their client is at least as serious as the traditional type of conflict that occurs when an attorney represents two clients with competing interests.

Here, it is clear that T&F's misconduct clearly relates to the representation of the Louimas for which they are now seeking fees and are not mere "technical" violations of the Disciplinary Rules. Instead, it is clear that a number of the disclosures created problems for Louima by raising questions about potential ethical violations by Louima's counsel and by calling into doubt Louima's motives and his credibility. While the Court finds T&F's actions to be in violation of the Disciplinary Rules,[101] the Court also concludes that, should it be determined that T&F had good cause to withdraw, or were

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[101] There has been no evidence of any ethical violations by Ms. Roper-Simpson, who appears to have acted in Louima's interest at all times and did not have any discussions with the press that were not authorized.

terminated without cause, complete forfeiture of their fees based on these press disclosures is not warranted. While the disclosure of client secrets and confidences is a significant breach of an attorney's ethical obligations, it is not akin to theft, fraud, or other criminal acts. Indeed, many of the unauthorized press statements occurred long before T&F resigned from the case, and, while they were an issue of concern for Louima, the statements did not cause Louima to terminate T&F earlier. However, because the Court considers T&F's breaches to be extremely serious, this Court respectfully recommends that T&F forfeit a significant portion of their fees due to their unjustified disclosure of their client's secrets.

E. Roper-Simpson's Claim to Fees

Before calculating the amount of fees to which T&F would have been entitled if they had withdrawn with good cause, this Court must first address Ms. Roper-Simpson's claim for fees in this action.

Despite her attorney's protestation to the contrary (see R.S. Tr. III at 76), Ms. Roper-Simpson's position regarding the basis for her right to compensation has changed during the course of the fee dispute. Initially, prior to the commencement of the fee hearing, she conceded that she was not hired by the Louimas, but that she was retained to assist T&F. (See R.S. Mem. at 11 (stating "Ms. Roper-Simpson had no agreement with the Louimas, oral or written")). In her Affidavit filed prior to the fee hearing, she represented that while she was "self-employed" and had "never been an employee" of either Thomas, Figeroux or the T&F firm,[102]

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[102] She testified during the fee proceeding that she was never an associate in the firm of T&F, nor a partner either. (R.S. Tr. III at 130).

"[s]ometime in August 1997, Carl W. Thomas, Brian Figeroux and myself had agreed orally that fees from all the cases which were jointly handled by us would be shared equally among us." (Affidavit of Casilda Roper-Simpson, dated Mar. 29, 2001 ("R.S. Aff.") ¶¶ 8 - 10).

However, during the course of her testimony at the hearing, she was questioned about certain notes in her personal diary which reflected the following: "TC [Carl Thomas] states that [he] think[s] FB [Brian Figeroux] thinks & concern that I [Roper-Simpson] want proportionate. That's why he's keeping me out of meeting[s]." (Ex. 84-O; R.S. Tr. III at 72). She explained that what she was referring to here was a discussion about the arrangement to split fees in the Louima matter three ways with T&F. (R.S. Tr. III at 72). Her notes further indicate that when she pressed for a contract in writing, Figeroux "stated [n]o writing. Attys keep changing, percentage keep chang[ing]." (Ex. 84-O). On the other hand, she testified that Thomas thought she should receive a third. (R.S. Tr. III at 87). When asked at the hearing, whether she had an agreement with the T&F lawyers that there would be a one-third split of any fees received from the Louima matter, she conceded that at the time she wrote these notes, there was no agreement. (R.S. Tr. III at 78 -79). She stated: "Well, there was really never an understanding. That's why we were in the process of negotiating, myself and Brian and Carl." (Id. at 79). However, by late September of 1997, Roper-Simpson believed she had "an oral agreement" of a one-third split among her, Thomas and Figeroux. (Id. at 128, 130, 152-53). She also conceded that nowhere in her notes had she indicated that she believed Louima would have to pay her. (Id. at 79).

However, in the course of her testimony during the fee proceedings, Roper-Simpson seemed to suggest that she had an

oral agreement directly with the Louimas. When questioned about the statements in her Affidavit, she confirmed that she never had a written agreement with Louima, but her testimony was unclear as to whether she was asserting a claim that she had an oral agreement with him. When asked by counsel for CN&S whether it was true that "neither Abner nor Micheline Louima ever orally retained you," Roper-Simpson responded: "I can't positively respond to that in terms of yes or no." (R.S. Tr. II at 178). She testified that there was a conversation in January of 1998, in which Louima allegedly said to her and to Thomas and Figeroux that he wanted them to continue to work on the case, and that she believed Louima was referring to her as well since she was in the room at the time. (Id. at 180). When confronted with the statement in her attorney's Memorandum of Law that she was not asserting that she had an oral or written agreement with the Louimas, Roper-Simpson agreed that the statement that she had no written agreement with Louima was correct, but testified that "[i]n reference to the oral part I again say, no. And in any event, I did not read all of this by my attorney." (Id. at 181).

Subsequently, during the course of her testimony, Roper-Simpson's counsel made it clear that she was seeking fees under two theories: one theory was that she should receive a one-third portion of any amount that is awarded to T&F, and under a separate theory, she argues that she has an independent claim that entitles her to receive fees directly from Louima calculated on a quantum meruit basis. (R.S. Tr. III at 73-76). This second theory, although not spelled out in any detail, seems to appear in Roper-Simpson's legal memorandum submitted prior to the hearing. This memorandum contained the following assertion:

> In the event that the court declines to enforce the Retainer Agreement of November 3, 1997, Ms.

> Roper-Simpson should be paid from the settlement proceeds. . .on the theory of quantum meruit. Ms. Roper-Simpson had no agreement with the Louimas, oral or written. However, she rendered her professional services to the Louimas for their benefit.

(R.S. Mem. at 11).

In her post-hearing papers, Roper-Simpson seems to have abandoned any claim that she is seeking fees directly from Louima. However, to the extent that Roper-Simpson may still be claiming that she is entitled to fees directly from Louima as the result of some sort of oral agreement, this Court does not find her testimony to be credible in that regard. First, her representation that she had an agreement with Louima conflicts with her March 2001 Affidavit, and directly contradicts statements in her attorney's memorandum of law. Moreover, she conceded an awareness of the rules of the Second Department which require attorneys in a contingency fee case to file a retainer statement with the Office of Court Administration, and admitted that she had not done so here. (R.S. Tr. II at 188-194; N.Y. Comp. Codes R. & Regs., tit. 22, § 691.20).[103] Based on the totality of credible evidence, the Court concludes that Ms. Roper-Simpson has no direct claim for fees as the result of an agreement with the Louimas.

Her Post-Hearing Memorandum of Law states: "[i]t is also no longer in dispute that Roper-Simpson has an enforceable

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[103] In addition, D.R. 2-106(d) requires all contingent fee agreements to be documented in a writing provided to the client. D.R. 2-106(d), 22 N.Y. Comp. Codes R. & Regs., tit. 22, § 1200.11.

fee-sharing agreement with the firm of Thomas & Figeroux." (R.S. Post-Tr. Br. at 9). What she claims now is that:

> She was working pursuant to an oral understanding with Thomas & Figeroux to share fees due to Thomas & Figeroux by virtue of Plaintiffs' Exhibit 2 [the Retainer Agreement].
>
> By virtue of her oral agreement with [T&F] to an equal share of fees in this case, Roper-Simpson has a beneficial interest in Exhibit 2.

(Id. at 28).

To the extent that she claims entitlement to fees based upon a theory of quantum meruit, Roper-Simpson cites no cases in support of her claim that she is entitled to a share based on a theory that she is a third-party beneficiary to the Retainer Agreement executed by the Louimas and dated November 3, 1997. (R.S. Post-Tr. Br. at 28; Ex. 2).[104] Indeed, it is clear that, given this Court's finding that there was no direct retainer agreement entered into between the Louimas and Roper-Simpson, she cannot recover any portion of the fees, unless she demonstrates that she had an agreement with T&F, in which case her share would come out of the share allocated to T&F.[105] See, e.g., Warren v. Meyers, 187

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[104] This Retainer Agreement lists Rubenstein & Rynecki, Thomas & Figeroux, and Johnnie Cochran, Barry Scheck and Peter Neufeld. (Ex. 2). Roper-Simpson's name does not appear anywhere in the document. (Id.)

[105] Her actions and those of T&F in reaching a fee-splitting agreement also arguably violate the Disciplinary Rules. D.R. 2-107 prohibits the division of fees for legal services with an attorney who is not a partner

Misc.2d 668, 673, 723 N.Y.S.2d 337, 342 (N.Y. Sup. Ct. 2001) (finding that firm that performed work on behalf of client with client's knowledge but without valid retainer agreement could not assert direct claim upon client for fee but was entitled to a share of the fee awarded to the referring attorney). Although Roper-Simpson may be entitled to an "equitable lien" on T&F's share of the fees based on an agreement with T&F, made with the client's authority (see discussion supra at 101-105), Roper-Simpson must first establish that she had such an agreement with T&F and that Louima was aware of it and approved of it.

However, it is unclear to this Court on what basis Roper-Simpson is claiming that she had a firm agreement with T&F. While Roper-Simpson asserts that she had an oral agreement to split fees with T&F, her own testimony in this regard is conflicted, and the notes taken contemporaneously with discussions that she had with T&F on this topic suggest otherwise. In addition, Figeroux's testimony does not confirm that any such solid agreement regarding Roper-Simpson's compensation was reached. At the hearing, Figeroux testified that Thomas brought Roper-Simpson in to work on the case (F. Tr. III at 37), and he also testified that, in his opinion, "she was an employee of Carl W. Thomas." (Id. at 64).[106]

Based on Roper-Simpson's and Figeroux's description of

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or associate in the lawyer's firm except with the client's consent. D.R. 2-107, N.Y. Comp. Codes R. & Regs., tit. 22,§ 1200.12.

[106] He also testified that the firm of T&F was actually created on the same day Figeroux came back from his first visit with Louima in the hospital and met with Thomas. (F. Tr. III at 64). From the chronology of events, it appears that Roper-Simpson became involved shortly thereafter.

the relationship between Roper-Simpson and T&F, it is likely that any fee arrangement would have been discussed primarily between Roper-Simpson and Thomas, who, of course, was deceased at the time of these proceedings. However, while the precise contours of Roper-Simpson's arrangement with T&F are not clear, and in fact may never have been agreed upon, it is also clear that neither Roper-Simpson, Thomas, nor Figeroux thought that Roper-Simpson was working for free. (See R.S. Post-Tr. Br. at 28). In addition, Louima's repeated contacts with Roper-Simpson demonstrate that he was aware of her efforts and did not object to her collaboration with T&F. In fact, Louima acknowledged that he understood that Roper-Simpson was working with T&F, and that she would be paid by them. (L. Tr. at 14-15; see also Ex. 8).

Therefore, to the extent that T&F are entitled to receive fees in this matter, Roper-Simpson is entitled to a share of those fees. At this point, however, given this Court's recommendation that T&F receive no portion of the attorneys' fees, this Court respectfully recommends that Roper-Simpson also receive no fees. In the event that it is determined that T&F should receive a percentage of the fee award, this Court respectfully recommends that Roper-Simpson receive a portion of those fees awarded to T&F based on her contribution to the Louimas' representation.

F. Fee Determination

In determining an appropriate fee in a case where there has no misconduct by counsel, the New York Court of Appeals has held that "a discharged attorney may recover the 'fair and reasonable value' of the services rendered . . . determined at the time of discharge and computed on the basis of quantum meruit." In re Cohen v. Grainger, Tesoriero & Bell, 81 N.Y.2d 655, 658, 522 N.E.2d 288, 290, 602 N.Y.S.2d 788, 790 (1993) (internal

citations omitted). Even where a retainer agreement assigns a portion of the proceeds of an action to counsel, "[w]hen the attorney-client relationship is terminated in the midst of the attorney's representation, counsel's entitlement to fees is no longer governed by the terms of the retainer agreement." Casper v. Lew Lieberbaum & Co., Inc., 1999 WL 335334, at *5. Instead, the attorney may be allowed a charging lien upon any proceeds of the lawsuit, to be determined on a quantum meruit basis once the case is concluded. Id. at 5-7; see also People v. Keeffe, 50 N.Y.2d at 156-57, 405 N.E.2d at 1015, 428 N.Y.S.2d at 450. In determining a fixed dollar amount based on quantum meruit, the court can take into account the original retainer agreement, see Universal Acupuncture Pain Servs., P.C. v. Quadrino & Schwartz, P.C., No. 02 CV 9469, 2004 WL 1203147, at *3 (2d Cir. June 2, 2004); Matter of Tillman, 259 N.Y. 133, 135, 181 N.E. 75, 7576 (1932), and may consider the size of recovery. Cheng v. Modensky Leasing, Corp. Inc., 73 N.Y.2d at 459, 539 N.E.2d at 573, 525 N.Y.S.2d at 330

If the client and his attorney agree, the attorney may receive a percentage of the recovery as a fee. See Universal Acupuncture Pain Servs., P.C. v. Quadrino & Schwartz, P.C., 2004 WL 1203147, at *2; Reubenbaum v. B. & H. Express, Inc., 6 A.D.2d 47, 48, 174 N.Y.S.2d 287, 289-90 (1st Dep't 1958). Thus, once an attorney is determined to have the right to assert a charging lien, the "outgoing attorneys have the option of taking a fixed dollar amount compensation, presently determined on a basis of quantum meruit, or, instead, of taking a contingent amount or percentage also based on quantum meruit but with the amount or percentage determined in an ancillary proceeding at the conclusion of the case." Paolillo v. American Export Isbrandtsen Lines, Inc., 305 F. Supp. 250, 251 (S.D.N.Y. 1969); see also Bradley v. Consol. Edison Co. of New York, No. 83 CV 7504, 1991 WL 156368, at *4

(S.D.N.Y. Aug. 7, 1991).

The New York Court of Appeals has made it clear that when the fee dispute is between counsel, "[t]he discharged attorney may elect to receive compensation immediately based on quantum meruit or on a contingent percentage fee based on his or her proportionate share of the work performed on the whole case." In re Cohen v. Grainger, Tesoriero & Bell, 81 N.Y.2d at 658, 622 N.E.2d at 290, 602 N.Y.S.2d at 790. Since "as a practical matter, quantum meruit valuation of services rendered by a discharged attorney can best be determined at the time of discharge, rather than some months or years later when the case finally ends," and "the calculation of a contingent percentage fee is better left to the conclusion of the litigation when the amount of the recovery and the relative contributions of the lawyers to it can be ascertained," the court has left the election of the method for determining fees to the departing counsel. 81 N.Y.2d at 659, 622 N.E.2d at 290, 602 N.Y.S.2d at 790 (citations omitted). Where the attorney takes no action at the time of discharge or remains silent as to his election of the method by which fees should be determined, the Court of Appeals has held that "the presumption should be that the contingent fee has been chosen." 81 N.Y.2d at 660, 622 N.E.2d at 290, 602 N.Y.S.2d at 790. See also Cheng v. Modansky Leasing Co., 73 N.Y.2d at 458, 539 N.E.2d at 572, 541 N.Y.S.2d at 744 (noting that the contingent percentage fee "may be fixed at the time of substitution but . . . is better determined at the conclusion of the case when such factors as the amount of time spent by each lawyer on the case, the work performed and the amount of recovery can be ascertained").

Here, it is clear from the actions of T&F following the termination, confirmed by Figeroux's testimony at the hearing (F. Tr. III at 23-24), that T&F elected to receive a percentage of the

recovery rather than a fee based on quantum meruit. Although the retainer agreement of November 3, 1997, specifies that the fees will be divided one-third to CN&S, one-third to the Rubenstein firm, and one-third to T&F, this Court finds that if T&F is to receive any share, equity demands a significant reduction in T&F's share as justified by T&F's conduct in violation of the Disciplinary Rules. To the extent that T&F are entitled to receive some compensation, albeit reduced, it is in recognition of the fact that T&F did perform a valuable service to Louima in the early weeks following the incident.

In determining the reasonable value of the services rendered by an attorney, some courts have considered the following factors: "(1) time, (2) standing of the lawyer at the bar; (3) amount involved; (4) benefit to the client and (5) skill demanded." Paollilo v. American Export Isbrandsten Lines, Inc., 305 F. Supp. at 251. See also D.R. 2-106, N.Y. Comp. Codes R. & Regs., tit. 22 § 1200.11 (setting forth factors relevant to determining reasonableness of fee).

Indeed, normally, in calculating a reasonable attorney's fee, courts first determine a "lodestar" figure by multiplying the number of hours reasonably spent by counsel on the matter by a reasonable hourly rate. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Cruz v. Local Union No. 3 of Int'l Bhd. of Elec. Workers, 34 F.3d 1148, 1159 (2d Cir. 1994); F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1263 (2d Cir. 1987); Cowan v. Ernest Codelia, P.C., No. 98 CV 5548, 2001 WL 30501, at *7 (S.D.N.Y. Jan. 12, 2001). "While there is a strong presumption that this amount represents a reasonable fee," Cowan v. Ernest Codelia, P.C., 2001 WL 30501, at *7, this resulting "lodestar" figure can be adjusted upward or downward based on other considerations. See Quaratino v. Tiffany & Co., 166 F.3d 422, 425 (2d Cir. 1999). It

is clear, however, that "'[t]he fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.'" Cruz v. Local Union Number 3, 34 F.3d at 1160 (quoting Hensley v. Eckerhart, 461 U.S. at 437).

In connection with fee applications, courts generally require the party seeking fees to submit detailed records, listing the services rendered in connection with the action, the name of each attorney who worked on the matter, the date that services were performed, the hours spent in performing the services, and the hourly rate charged. See New York State Ass'n For Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983) (holding that an attorney "who applies for court-ordered specify[ing],for each attorney, the date, the hours expended, and the nature of the work done"). It is clearly the attorney's burden to maintain contemporaneous records, see F. H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d at 1265, and fee applications are subject to denial where the fees have not been adequately documented. See, e.g., Riordan v. Nationwide Mut. Fire Ins. Co., 977 F.2d 47, 53 (2d Cir. 1992).

In this case, however, none of the attorneys have submitted time records to the Court. Indeed, Figeroux and Roper-Simpson have made it clear in their testimony that there were no fee records kept in this case and indeed, apart from Ms. Roper-Simpson's personal diary, there are no documents, phone records, calendars, correspondence or legal papers of any kind that were kept by either T&F or Roper-Simpson. The absence of any documentation whatsoever compounds the already difficult job of assessing an appropriate discount to the one-third percentage of fees that would have been received had T&F not committed these ethical violations. Accordingly, in order to reach an appropriate fee, this Court has

analyzed the relative contributions of the attorneys to the case as follows.

(1) Standing at the Bar

Looking to the five factors listed in enumerated in Paollilo and considering first the standing of the attorneys at the bar, all of the attorneys appear to have been members of the bar in good standing. However, based on the relative experience of the attorneys in pursuing complex civil rights cases, CN&S collectively have significantly more experience in these types of cases than T&F.

Johnnie L. Cochran, Jr. testified that he graduated from law school in June 1962, was admitted to the California Bar on January 10, 1963 and worked as a prosecutor for the City of Los Angeles for two and a half years. (C. Tr. I at 178). He then opened his own firm practicing civil and criminal law from mid 1965 to the end of 1977, at which time he was appointed Assistant District Attorney for Los Angeles County, which, according to Cochran, was the third ranking position in the Los Angeles County District Attorney's Office. (Id.) At the end of 1980, he returned to private practice, concentrating primarily in civil rights litigation, as well as criminal defense work. (Id. at 178-79).

Barry C. Scheck testified that he is 53 years old, graduated from Yale University and from law school at the University of California at Berkley. (S. Tr. I at 22). Following law school, he worked briefly for the Farm Workers Union, and then in the summer of 1975, he took a job with the Legal Aid Society as a public defender in the South Bronx. (Id. at 22-23). In 1978, he started a clinical program at Cardozo School of Law as a Director of Clinical Education where he not only supervised students but also

handled a variety of high profile criminal cases. (Id. at 23-26). In 1988 and 1989, Scheck, along with Neufeld, began litigating cases involving DNA testing, eventually culminating in the founding of the Innocence Project in 1992. (Id. at 26).

Peter Neufeld, a 1975 graduate of New York University Law School, testified that his first job following graduation was with a Seattle law firm that specialized in civil rights work. (N. Tr. I at 9-10). He then went to work for the Legal Aid Society, Criminal Defense Division, where he spent seven years, after which he went into private practice in the mid-1980's. (Id. at 10). He also taught trial advocacy at Fordham Law School and then, in the early 1990s, he left Fordham to join Barry Scheck teaching at Cardozo Law School in conjunction with their work on the Innocence Project. (Id.) Neufeld testified that approximately 50% of his time currently is spent on the Innocence Project and he does that work "completely pro bono." (Id. at 11). He is also counsel or co-counsel in "dozens" of capital cases throughout the country which again, he does pro bono. (Id.) He served on the New York State Commission on Forensic Science and is chairman of the Medical Committee of Montefiore Medical Center, both of which are unpaid positions. (Id. at 11-12).

Sanford Rubenstein testified that he received an Associates of Art Degree from Rockland Community College and a Bachelor of Arts Degree from State University of New York at Oswego. (R. Tr. at 27). He graduated from Brooklyn Law School in 1971 and, after being admitted to the Bar, he became a partner in the firm of Jacobs, Jacobs, Scolnick & Rubenstein, with an office in the Bedford Stuyvesant section of Brooklyn, where his practice was a general one with an emphasis on personal injury cases. (Id. at 28). Although Rubenstein remained a partner, the firm changed names several times over the years until now it is known as Rubenstein &

Rynecki, with offices at 16 Court Street in Brooklyn. (Id.) According to Mr. Rubenstein, the firm has been focusing on personal injury and civil rights cases for over 30 years. (Id. at 29). Although he has never tried a civil rights case to verdict, Mr. Rubenstein testified that he had represented victims in civil rights cases before, but all of them had settled before trial, including the Harper case which Rubenstein worked on in conjunction with Mr. Thomas. (Id. at 101, 115-16).

Mr. Rubenstein testified that he had been representing members of the Haitian community for thirty years and been active in causes affecting the Haitian community for the last fifteen years. (Id.) Among other issues, Rubenstein, along with leaders of the community, lobbied members of Congress and the State Department in an effort to send teams of observers in connection with the 1990 presidential election in Haiti. (Id. at 29-30). He has received a number of awards from a number of Haitian organizations, the Haitian government, and the Haitian Bar Association, as well as receiving a citation from President Clinton for his work in Haiti. (Id. at 30).

As to Mr. Thomas' background, Elizabeth Thomas, Mr. Thomas' widow and executrix of his estate, testified that Thomas came to the United States in 1980 from Trinidad, and at the time of his death, he had four children, aged 19, 18, 17 and 5. (Thomas Tr. at 32-33). He attended Brooklyn College, where he majored in Political Science, and later became an Adjunct Professor. (Id. at 33). He graduated from New York University Law School where he was the first student from Brooklyn College to receive a Root Tilden Scholarship. (Id. at 34). After graduation, he served in the Brooklyn District Attorney's Office as an Assistant District Attorney ("A.D.A.") and then opened his own law practice. (Id.) At some point in time, he began to share an office with Figeroux.

(Id. at 37). In addition, Mr. Thompson testified that he was aware that Thomas had represented Nicolas Haywood, Sr., the plaintiff in another civil rights case in which Haywood's child had been shot by a police officer when he saw the child with a plastic gun. (T. Tr. at 228).

Brian Figeroux also served as an A.D.A. in the Major Fraud and Organized Crime units of the Brooklyn District Attorney's Office, but he never tried a case as an A.D.A. (F. Tr. I at 89; F. Tr. III at 48). After leaving the office in 1996, Figeroux started his own practice in the areas of immigration, matrimonial, real estate, and personal injury law. (F. Tr. II at 70-71). He testified that he gives free consultations on Saturdays, provides a free publication for immigrants, and participates in a program on station WPAT where they discuss immigration and landlord-tenant issues. (Id. at 71-72). He is also the legal advisor for the United States Steel Band Association, the All Fours Alliance, and the Trinidad ex-police force. (Id. at 72). When questioned, Figeroux conceded that he had never prosecuted a complex civil case. (Id. at 48-49). When asked if Thomas had prosecuted a complex civil rights case, he also testified, "Not that I know of." (Id. at 49).

According to her testimony, Ms. Roper-Simpson attended New York City Community College in 1980, where she received an Associate Applied degree in legal secretarial science. (R.S. Tr. I at 7). She graduated from Bernard Baruch College in 1987 with a Bachelor's Degree in political science. (Id.) She subsequently graduated from Brooklyn Law School in 1994. (Id.) Following graduation from law school, she was admitted to the Bar in 1996 and went into practice with her sister, who had an office at 1399 Fulton Street, Brooklyn. (Id.; R.S. Tr. III at 133). She practiced law with her sister until late 1997 when she opened her own office on Long Island. (R.S. Tr. I at 7). At the time she became involved

in the Louima matter, she was running for City Council in the 41st district in Brooklyn and was still working out of her sister's office in Brooklyn. (Id. at 7-8). She had met Carl Thomas in 1994 in the library when she was studying for the Bar exam, and in August of 1997, Thomas was "somewhat my campaign manager." (Id.)

Thus, while both sets of attorneys were experienced, Cochran, Neufeld and Scheck collectively had more experience with complex litigation in general and civil rights cases in particular than Thomas, Figeroux, and Roper-Simpson.

(2) T&F's Contributions

Turning next to their respective contributions to the case, the time spent and the relative benefits bestowed on the Louimas as a result of their work, T&F contend that from August 1997 until November 1997, Thomas, Figeroux and Roper-Simpson expended "many hundreds of hours" per month on behalf of Louima, "typically work[ing] six days or more a week, and ten hours or more a day, spending 70% or more of their time on Louima's matter." (T&F Post-Tr. Br. at 17 (citing Figeroux Tr. III at 39, 43-49; Monceour Tr. at 130-35; R.S. Tr. I at 139-44; Thomas Tr. at 41-44)). Ms. Thomas testified that her husband spent "[m]any, many hours" on the case in the period following Louima's assault; in fact she "[h]ardly ever" saw him during this period. (Thomas Tr. at 40-41). Ms. Thomas stated that she "thought as though my family also worked on [the] case because we never saw him." (Id. at 41). She testified that he would work very late at night making phone calls. (Id.) She also testified that there were one or two meetings held at her home involving the Louima case. (Id. at 4243). Ms. Thomas testified that she was present for one or two of these meetings and that Figeroux and others were also present. (Id. at 43). She actually met Louima at his home. (Id. at 44-45).

T&F assert that, among other things, they spent time: 1) communicating with the prosecutors and assisting in the government's investigation (F. Tr. III at 42-43, 45; R.S. Tr. I at 141; T. Tr. at 235, 261); 2) organizing community protests and marches (R.S. Tr. at 140-41; F. Tr. III at 55-56); 3) representing Louima in grand jury proceedings and government interviews (R.S. Tr. I at 50, 166; F. Tr. III at 62-63); 4) undertaking to obtain permission for Louima's daughter to enter the United States (R.S. Tr. I at 134-35, N. Tr. I at 102; Ex. 52); and 5) sponsoring Cochran's admission to the Eastern District of New York. (R.S. Tr. IV at 55-56; Thomas Tr. at 45-46; L. Tr. at 122).

T&F also facilitated the interview with McAlary (C. Tr. II at 106-07; N. Tr. II at 146; F. Tr. III at 38-39), gave a press conference to channel N.Y. 1 regarding Louima's torture, solicited the involvement of the Reverend Al Sharpton, the Reverend Calvin Butts, and the New York Civil Liberties Union (F. Tr. III at 37-38, 58-59; R.S. Tr. I at 20), and made numerous contacts with the press and television appearances on Louima's behalf. (R.S. Tr. I at 49-50; C. Tr. II at 33-34; F. Tr. III at 54).[107] They coordinated and consulted with Neufeld initially on Louima's care and on the retention of the Walker Investigative Agency. (N. Tr. I. at 20; N. Tr. II at 28). Perhaps most important, they were instrumental in contacting Mr. Thompson and seeking the involvement of the U.S.

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[107] They also claim that they assisted Rubenstein in filing the initial Notice of Claim. (T& F Post-Tr. Br. at 9; Ex. 3). Rubenstein, however, testified that the initial Notice of Claim was prepared by Mr. Rynecki and brought to Brooklyn Hospital on August 15, 1997 where it was signed by Louima. (R. Tr. at 39). While T&F may have reviewed it prior to the filing, neither Thomas or Figeroux signed the Notice of Claim, and Rubenstein's testimony suggests that his firm did the bulk of the work associated with the first Notice of Claim.

Attorney's Office.[108] (T. Tr. at 218).

However, neither T&F nor Roper-Simpson presented a single piece of evidence to corroborate their testimony as to the amount of hours they spent on the Louima case. They presented not a single time slip; they kept no time records.[109] More important, however, is the fact that, when questioned, Figeroux testified that he had no notes, papers or writings to document the investigative work performed on behalf of Louima, not "a single piece of paper" reflecting "even a single conversation" with Louima. (F. Tr. II at 49).[110] Figeroux testified that he depended on Roper-Simpson to take notes but even when she was not present, he did not believe it was necessary to take notes. (Id. at 49-51). Although

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[108] Roper-Simpson also claimed that she spent an extended amount of time successfully defending more than a hundred persons arrested for protesting on Louima's behalf, which she did without compensation. (R.S. Tr. I at 62-65). However, she failed to present any evidence that Louima had authorized her to do such work or more importantly agreed to pay for it. Nor has she presented a single authority authorizing payment of fees from one client, without authorization, for work performed for other clients in circumstances similar to these.

[109] However, the failure to provide contemporaneous time records is not fatal to T&F's claim for fees. See 601 West Assocs. LLC v. Kleiser-Walczak Constr. Co., No. 03 CV 7942, 2004 WL 1117901, at *5 (S.D.N.Y. May 18, 2004).

[110] Neufeld testified that, although he asked on more than one occasion for any notes or files that Thomas, Figeroux, or Roper-Simpson had kept that related to Louima's case, he was told that they had no notes or files. (N. Tr. I at 89). During his deposition by Mr. Fischetti, Figeroux testified that he did not take any notes of what was said by Louima nor did he recall the specifics of their discussions during the first days. (Ex. 41 at 10).

Roper-Simpson presented one page of notes taken during a witness interview, she testified that she did not take notes of what occurred at the initial meeting with the U.S. Attorney's Office (R.S. Tr. I at 175-76), or Louima's interview with the District Attorney's Office, nor did she "have any notes per se of the case." (R.S. Tr. III at 112).[111] Whatever notes she had were given to Figeroux, who did not produce them for the hearing. (Id.)

Nor did T&F or Roper-Simpson present any documents, correspondence, research, or records of any kind to show the type of legal or other work they performed on the case. They did not have any records of phone calls, diaries or even files opened on the matter. Although Roper-Simpson kept a diary for a brief period of time in which she recorded certain events, this diary was, as she ultimately conceded, written largely as a precursor to a book she intended to write. (R.S. Tr. IV at 13, 25-26).

(3) The Work Performed by CN&S and Rubenstein

By comparison, it is clear from all the evidence, that CN&S, and to a lesser extent the Rubenstein firm, were responsible for researching, drafting and filing the civil action on behalf of the Louimas and for obtaining the $8.75 million settlement on their

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[111] Roper-Simpson testified that "most of the time . . . I was sitting [in the hospital] with [Louima], I would be reading a book. My job if you will was to make sure that no one spoke to him without an attorney being there." (R.S. Tr. I at 42)

behalf.[112] As Mr. Scheck testified, CN&S investigated the underlying facts, hired investigators, consulted with physician specialists and expert psychiatrists, and dealt generally with the Louimas. (S. Tr. I at 50-51; N. Tr. I at 20-24; 28-33). They also participated in numerous debriefing sessions with the government. (S. Tr. I at 53-58). Indeed, it is clear from Neufeld's testimony that from the beginning, he was primarily responsible for trying to obtain physicians and mental health experts to deal with Louima's mental and physical condition. (N. Tr. I at 19-23). He was also involved in lobbying the Justice Department and the U.S. Attorney's Office to pursue a "pattern and practice" civil rights case, as well as dealing with the City Council to obtain records of other similar claims. (Id. at 35-38). Neufeld and Cochran also caucused with black leaders and groups of civil rights attorneys for support. (Id. at 38; N. Tr. II at 161; C. Tr. I at 212).

In addition, CN&S litigated a motion before Judge Nickerson to prevent disclosure of the psychiatrist's notes to the defense in the criminal prosecution (S. Tr. I at 137), and litigated against the City for an opportunity to take photographs of the precinct house. (N. Tr. I at 33). CN&S also collaborated with the government in its efforts to have the witness Sonia Miller speak to the prosecutors - - an event that Ms. Palmer described as one of the most "significant" in the case. (P. Tr. at 23). Either Scheck or Neufeld attended the debriefings of Louima by the government, which were numerous and occurred over several months. (Id. at 15-16; S. Tr. I at 54; T. Tr. at 233). While Roper-Simpson was present during Louima's state grand jury testimony (R.S. Tr. I at

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[112] Although Neufeld testified that he may have kept some time records related to the Louima matter, neither the CN&S attorneys nor Rubenstein have submitted any time records to this Court in support of their motion.

170-71), and Figeroux attended some of the early debriefings with the government, it is clear from the testimony of the government prosecutors, as well as the attorneys, that Figeroux only participated on several occasions and then stopped attending. (S. Tr. I at 72; P. Tr. at 18; F. Tr. III at 45).

CN&S also litigated a matter before this Court relating to fees to be paid to the PBA lawyers and a potential conflict of interest stemming from PBA's counsel's attempts to represent both the PBA and the individually named defendant officers. (S. Tr. I at 137). According to Scheck, CN&S spent "hundred of hours of research" to develop their Monell theory; they hired a criminologist, Dr. Jeffrey Fagan, and consulted with leading experts in police practices and training. (Id. at 137-38). They employed law students to review other cities' practices regarding investigations of police misconduct. (Id. at 138). They met with ASA Leslie Confed. to exchange ideas regarding her pattern and practice investigation, and consulted with experts in their efforts to target the PBA as a defendant. (Id. at 138-39).

Peter Neufeld testified that he had 18 lateral feet of files in his office related to this case. (N. Tr. I at 45). He also researched approximately twenty discrete legal issues in connection with the case. (N. Tr. I at 70-71, 74-76; N. Tr. II at 187-88). CN&S took one deposition in connection with Louima's case (N. Tr. I at 81; N. Tr. II at 189), and served document requests and interrogatories. (N. Tr. I at 81).

The Verified Complaint, prepared and filed by CN&S and the Rubenstein firm on August 6, 1998, long after T&F had ceased their representation, consisted of forty pages of pleadings and contained twenty-two counts against the City, the NYPD, the PBA,

sixteen named police officers, PBA members and EMS workers, as well as unnamed individuals, alleging, inter alia, federal claims of conspiracy, false arrest, excessive force, delay of medical treatment, and failure to intercede, in violation of 42 U.S.C § 1983. (Ex. 46). There were also supplemental state law claims for the same offenses, as well as a Monell claim against the City. (Id.) The First Amended Complaint was subsequently filed on December 4, 1998, adding an additional named defendant. (N. Tr. I at 67; Ex. 47). A Second Amended Complaint was filed on August 16, 2000 (Ex. 48), and a Third Amended Complaint was filed on September 27, 2000. (Ex. 49; N. Tr. II at 238-241).[113]

In response to the PBA's motion to dismiss the complaint, CN&S prepared and served a seventy-one (71) page Memorandum of Law, addressing the novel issue of the PBA's potential liability in a Section 1983 police brutality case. (N. Tr. I at 79-80; Ex. 50).[114] In addition, a tremendous amount of time was spent by CN&S and the Rubenstein firm attending settlement conferences with this Court, first in tense and difficult negotiations with the City of New York, and then with even more difficult and lengthy sessions with the PBA and its insurers. Without revealing the nature of these discussions in any detail, they included discussions of the "48 hour rule," and adoption by the PBA of a plan for conflict counsel. (N. Tr. I at 84-87). A review of the Court's calendar and

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[113] According to Neufeld, T&F and Roper-Simpson "had absolutely no role" in the research and drafting of the various Complaints, Exhibits 47, 48 and 49, even though that "research . . . was ongoing while they were still involved in the case." (N. Tr. I at 67).

[114] Neufeld testified that, in the fall of 1997, when he first mentioned pursuing this novel course of action against the PBA, Thomas and Figeroux "thought that the idea was stupid," and "declined specifically to offer any assistance in the drafting of these pleadings." (N. Tr. I at 63-64).

records demonstrates that, prior to settlement, there were approximately 33 conferences attended by CN&S and members of the Rubenstein firm over almost three years, at which settlement, among other things, was discussed.

Rubenstein testified that as part of his role in pursuing Louima's civil case, he prepared and filed the initial Notice of Claim, assisted Neufeld in drafting the amended Notice of Claim, reviewed the Summons and Complaint, suggesting various changes, and then was responsible for service of the Complaint on the defendants in the case. (R. Tr. at 75). He also reviewed the three amended complaints as well as the PBA's motion to dismiss and Louima's responsive papers. (Id.) He initiated settlement discussions with the Corporation Counsel's office, attending three or four meetings with members of that office. (Id. at 76). He then attended the numerous settlement conferences with this Court and was ultimately responsible for drafting the release, distributing the settlement proceeds and negotiating with various lien holders, doctors and hospitals, to reduce Louima's outstanding liens. (Id.)[115]

CN&S vehemently deny that T&F "did the lion's share of the work leading to recovery in this matter." (S. Tr. I at 136). They dispute T&F's contention that not only did T&F play a critical role in securing Louima's safety and bringing the case to the public's

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[115] Although T&F appear to question Rubenstein's right to recover his share of the fee based on the amount of work he performed, the courts have held that regardless of the amount of an attorney's contribution, he does not forfeit his fee as long as he never refused to contribute more substantially. See, e.g., Sterling v. Miller, 2 A.D.2d 900, 157 N.Y.S.2d 145, 147 (2d Dep't 1956), aff'd, 3 N.Y.2d 778, 143 N.E.2d 789, 164 N.Y.S.2d 32 (1957). Of course, with regard to T&F, the mere existence of a retainer agreement does not guarantee a right to fees when there has been an unjustified withdrawal and the commission of ethical violations.

attention, but that by generating interest in the United States Attorney's Office and persuading Louima's family of the wisdom of a federal prosecution,[116] T&F made the "eventual civil settlement at or about the level achieved virtually inevitable." (T&F Post-Tr. Br. at 75). Neufeld testified that CN&S was operating under the assumption that Louima's case would go to trial and thus CN&S was fully engaged in preparing for trial. (N. Tr. II at 193). Moreover, the outcome of such a trial was not a forgone conclusion, given the potential problems in proving a "pattern and practice" of violations by the City. (Id. at 191-92). Indeed, Figeroux conceded that it would be a difficult case to prove. (F. Tr. II at 54). While Volpe eventually entered a guilty plea, the government did encounter problems in the criminal trials of the other officers allegedly responsible for the aiding or concealing of the assault. In the end, it is impossible to say whether the City would have been willing to take the case to trial, but certainly the City could have argued that it should be absolved of Monell liability in light of the extreme and outrageous conduct of Volpe. The case against the PBA faced even more difficult legal obstacles and thus the outcome of the PBA's motion to dismiss was far from certain.

Based on all the evidence presented and this Court's own role in supervising pretrial discovery and settlement negotiations, this Court finds that T&F radically overstated the value of their contribution to the case. While their decision to reach out to Mr. Thompson at the U.S. Attorney's Office may have been instrumental in initiating the federal prosecutions that would vindicate Louima's rights, the publicity generated by the McAlary article, coupled with the firm and passionate dedication of Zachary Carter

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[116] Figeroux testified that members of Louima's family were originally opposed to a federal prosecution. (F. Tr. III at 40-41).

to pursuing investigations into civil rights violations, virtually guaranteed an inquiry by the Office. (P. Tr. at 7-8, 11-13, 74-75). Moreover, based on this Court's intimate involvement in the arduous settlement process, this Court finds that T&F's assertions ignore the amount of effort required by CN&S and the Rubenstein firm to persuade certain of the defendants to settle at all. While it is undeniable that T&F spent a fair amount of time dealing with the press and attending meetings with witnesses and the government in the early part of the case, it does not appear that they conducted any legal research in preparation for filing the civil action, and they did not attend a single court conference, assist in discovery, or engage in motion practice or submit legal papers of any kind. It is unclear to this Court, who personally spent countless hours with CN&S and the Rubenstein firm in attempting to settle the 162 Case 1:98-cv-05083-SJ-CLP Document 293 Filed 07/21/2004 Page 163 of 177 case, that T&F would ever have succeeded in attaining a settlement comparable to that actually recovered. Certainly, T&F have conceded that they never would have conceived of suing the PBA nor did they conduct any of the research necessary to formulate the claims set forth in the various complaints.

(4) Calculating the Value

Comparing the amount and nature of the work performed by T&F and Roper-Simpson with that of the other lawyers, this Court concludes that, in the absence of any fee sharing agreement, and had they committed no breaches of their ethical obligations, T&F's and Roper-Simpson's contributions to the Louimas' case would amount to at most 10 percent of the time and services

rendered in the case, or $303,175.01.[117] While they would have been entitled to receive a third of the total amount of attorney's fees pursuant to the fee-sharing agreement regardless of their contribution to the case, the Court finds T&F's misconduct not only vitiates any right that T&F would have had to their one-third share of the total fee award, but leads this Court to recommend a significant reduction below 10 percent of the total fees. Indeed, the Court finds that a reduction of 30% is warranted as a result of the extremely serious ethical violations committed by Thomas and Figeroux. This would result in a total fee of $212,222.50, payable to the firm of T&F.

In determining whether this is an appropriate portion of fees for T&F and Roper-Simpson, it is useful to estimate T&F's fees using the lodestar method. Taking the starting date of T&F's work on the case as August 11, 1997, the most that Thomas and Figeroux could have worked on the Louima matter, based on Figeroux's testimony, was 10 hours a day, six days a week for the period of August 11, 1997 through October 1997. (F. Tr. III at 43-49). In November, Figeroux testified that he and Thomas spent at most 50% of their time on the Louima matter. (Id.) Thus, based on Figeroux's estimation, T&F each spent roughly 800 hours each on the case. With respect to Roper-Simpson, it is clear from her testimony and her diary that she spent considerably less time on the case. She conceded that she was often not invited to various meetings of counsel and excluded from certain press events. (R.S. Tr. III at 69-70, 80-81). Her diary reflects only a limited number of entries relating to Louima in the first few weeks, and she was unable

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[117] The most recent statement from the escrow agent indicates that, as of June 30, 2004, the value of the total attorneys' fees held in escrow is $3,031,750.16.

to provide details regarding her efforts after the first few months. (See R.S. Tr. I at 139-44, 169; R.S. Tr. III at 122-26).

In determining an appropriate rate used to calculate the "lodestar" in a typical fee case, the Second Circuit has held that the rates used must be in line with those rates prevailing in "'the district in which the court sits.'" Luciano v. Olsten Corp., 109 F.3d 111, 115 (2d Cir. 1997) (quoting Polk v. New York State Dep't of Corr. Servs., 722 F.2d 23, 25 (2d Cir. 1983)). In addition to any evidentiary submissions by the parties, the Court may consider its own experience and familiarity with the case and with rates generally charged. See Cruz v. Local Union No. 3, 34 F.3d 1148, 1160 (2d Cir. 1994). Several recent cases have held that $175.00 to $200.00 per hour is an appropriate rate for a solo practitioner here in the Eastern District of New York. See, e.g., Schwartz v. Chan, 142 F. Supp. 2d 325, 332 (E.D.N.Y. 2001) (citing Savino v. Computer Credit, Inc., 164 F.3d 81, 87 (2d Cir. 1998) (finding hourly rate of $175.00 reasonable)); Walia v. Vivek Purmasir & Assocs., Inc., 160 F. Supp. 2d 380, 382 (E.D.N.Y. 2000) (increasing from $175 to $200 per hour the rate at which a solo practitioner in the Eastern District of New York should be compensated). See also Cush-Crawford v. AdChem, 94 F. Supp. 2d 294, 302 (E.D.N.Y. 2000) (noting that Second Circuit has approved rate of $200.00 per hour for partners in the Eastern District). Other cases have found that higher rates are appropriate for experienced attorneys in larger firms dealing with more complex issues or areas of specialized practice, see, e.g., New Leadership Comm. v. Davidson, 23 F. Supp. 2d 301 (E.D.N.Y. 1998) (supplementing the Report and Recommendation of the magistrate judge and approving as reasonable rates of $275 per hour for the partner, $200 for an experienced associate, $150 for a less experienced associate and $65 for law students); Fernandez v. North Shore Orthopedic Surgery & Sports Medicine, P.C., No. 96

CV 4489, 2000 WL 130637, at *2 (E.D.N.Y. Feb. 4, 2000) (finding $225.00 per hour reasonable for partners); Greenidge v. Mundo Shipping Corp., 60 F. Supp. 2d 10, 12-13 (E.D.N.Y. 1999) (finding that reasonable rates range between $200.00 to $225.00 for partners, $200.00 for senior associates and $100.00 for junior associates) (citing Perdue v. CUNY, 13 F. Supp. 2d 326, 345-46 (E.D.N.Y. 1998)).

Having considered the testimony of the witnesses regarding the background and experience of both Thomas and Figeroux, their limited experience in pursuing this type of civil rights case, and most importantly, the type of work they did on the case, the Court finds that a rate of $200.00 per hour would be more than generous. With respect to Ms. Roper-Simpson, who had been out of law school at the time for only three years, and admitted to the bar for only one year, a reasonable rate for her would be $125.00 per hour. See, e.g., Greenidge v. Mundo Shipping Corp., 60 F. Supp. 2d at 12-13.

Based on these numbers, which assume that T&F worked as many hours as they claim, the most T&F would have received on a quantum meruit basis is $160,000 for each of Thomas and Figeroux for a total of $320,000. Assuming Roper-Simpson spent half as many hours on the case as Thomas and Figeroux, she would be entitled to $50,000.

However, this Court finds it utterly incredible that Thomas and Figeroux spent six days a week, ten hours a day on the case for several months, and yet generated not a single document or scrap of paper. Likewise, based on her descriptions of the work she performed, this Court finds it impossible that Roper-Simpson spent even close to 400 hours on this matter. If a discount of 30% is taken to account for the inflated hourly estimates of Thomas,

Figeroux and Roper-Simpson, their fees would be reduced to $112,000 each for Thomas and Figeroux and $35,000 for Roper-Simpson. Given the Court's finding that a further reduction of 30% to Thomas and Figeroux's fees is warranted as a result of the extremely serious ethical violations committed by Thomas and Figeroux, that reduction produces a fee of $78,400 each for Thomas and Figeroux. Thus, the total award for the firm of T&F would be $191,800, which is comparable to the $212,222.50 computed by the Court as a percentage of the contingency fee.

However, as the Court notes below, Figeroux's actions in connection with this fee dispute, after the dissolution of Thomas and Figeroux's partnership, warrant a total forfeiture of his share of any fee.

G. Figeroux's Conduct

This Court finds that Figeroux's actions with respect to the allegations set forth in paragraph 14 of his Affidavit are so outrageous and so completely unjustified as to warrant forfeiture of his entire share of the fee.[118]

In his Affidavit, Figeroux essentially accused Louima of committing perjury and CN&S of suborning that perjury.

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[118] The Court agrees with the Estate's position that given that the Figeroux Affidavit was submitted after the death of Mr. Thomas, at a time when the partnership would have been dissolved as a matter of law, see N.Y. Partnership Law § 62(4), Figeroux's misconduct in this regard cannot be attributed to the Estate, or for that matter to Roper-Simpson, to deprive them of their share of the fees. See Vollgraff v. Block, 117 Misc.2d 489, 492, 458 N.Y.S.2d 437, 440 (N.Y. Sup. Ct. 1982) (partnership dissolution discharges former partner from obligations arising after dissolution).

Specifically, in paragraph 12 of the Affidavit, Figeroux accused Scheck of "improperly influencing witness testimony . . . and essentially telling the witnesses what to say." (Ex. 56 ¶ 12). Not only does this Court find Mr. Scheck's denial of this allegation completely credible, but the government witnesses who testified all denied that they ever "asked [T&F] to put a stop to this practice" or ever expressed a view that what Scheck was doing in ""preparing"" witnesses was in any way improper. (Id.) Neither Ms. Palmer nor Mr. Thompson agreed with Figeroux's claim that Scheck was doing anything improper.

While this false charge, impugning Mr. Scheck's integrity and alleging what is essentially criminal conduct on his part is a serious one, this Court is even more troubled by the statement in paragraph 14 of the Figeroux Affidavit: "After [the Tacopina meetings], we observed a change in Abner's testimony regarding . . . which officer - - Weise or Schwarz - - was present in the bathroom while Volpe was assaulting Abner." (Ex. 56¶14). Not only is there not a single shred of evidence in the record to support this statement, but Figeroux admitted to the FBI that, at the time it was made, Figeroux had never even read Louima's prior testimony. (F. Tr. I at 145). The prosecutors, who were intimately familiar with Louima's testimony and whose testimony this Court credits, emphatically stated that Louima never waivered in either his testimony or in his account of who was in the bathroom with Volpe; it was always the driver.

Once he realized the serious nature of the charges he had made against Louima, Figeroux attempted to back peddle, first during his meetings with the FBI and the government prosecutors and then with Mr. Fischetti. However, despite all these prior opportunities to clarify what he meant by this statement in paragraph 14, it was not until almost a year after the issue was raised in

Neufeld's Affidavit that Figeroux, at the hearing before this Court, attempted to argue that the use of the word "testimony" in his Affidavit was in error and that a better word to use would have been Louima's "account."

Having listened to the testimony and observed Figeroux's demeanor while testifying, the Court finds Figeroux's testimony in this regard not worthy of belief. Not only did Figeroux never file a corrected version of the affidavit, changing the word "testimony" to "account," but his explanation given to the Court was not even the same explanation that he gave to the FBI or to Mr. Fischetti. Instead, in each instance, he waffled and gave long convoluted statements about the investigation not proceeding in the right direction and his own personal feelings that it was Wiesel and not Schwarz in the bathroom, causing the prosecutors to declare in the first instance that he had recanted, a statement he still vehemently denies. Yet when asked by both Mr. Fischetti in his deposition and by Mr. Ross and this Court on several occasions during the fee proceedings to describe what the change was in Louima's "account," Figeroux could not do it. "I can't pinpoint anything," he told Fischetti. (F. Tr. I at 108; Ex. 41 at 35). In this regard and others too numerous to detail, this Court found Figeroux's testimony to be utterly incredible.

What compounded the problem, however, was Figeroux's final effort, after being subjected to much questioning on this issue, to provide an explanation as to the change in Louima's account. Specifically, he testified that during an overnight break in the proceedings, he re-read the notes from the meeting between CN&S and Tacopina. (F. Tr. II at 92-94). Suddenly, he recalled something that Louima had said about the police making two stops on the way to the precinct and his own belief that maybe the identity of the driver had changed. (Id. at 95). Not only had Figeroux never

mentioned this to the FBI, to the government prosecutors, to Mr. Ross or to the Court during the many hours of questioning focused on this very point, but the government witnesses, when asked, denied that this was even true. (See P. Tr. at 58; T. Tr. at 283-84). There was no change in Louima's statements in this regard either.

Based on all of the circumstances and particularly this Court's observations of Figeroux's demeanor during this testimony, I find that he not only filed an affidavit with the Court that contained at least one false statement, but that he perjured himself as well during the fee proceeding. While this Court recognizes that in the course of a highly charged, highly publicized case such as this, the rivalry among counsel can be intense and reckless things may be said, in this case, Figeroux overstepped the bounds of both ethical and moral conduct by accusing his former client of perjury in order to enhance his position in this fee dispute, regardless of whether the ultimate issue is one of money or reputation. Figeroux's reckless allegations of possible perjury by Louima in the volatile circumstances of an impending criminal trial where Louima was a key witness shocks the conscience of this Court. Given his threat to Neufeld and Scheck that he would "go to war" against Louima and "win at any cost" unless they agreed to pay him his fee, coupled with his incredible testimony at the hearing, leads this Court to recommend that Figeroux be found to have forfeited any claim to fees based on his conduct.[119] However, because at the time

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[119] The Court finds Figeroux's conduct in connection with this fee proceeding to be so beyond the bounds of ethical conduct that it warrants a referral to the Disciplinary Committee of the Bar and a recommendation that he be barred from further practice in this Court. However, recognizing the serious consequences of such a referral, the Court will not, at this time, make such a recommendation without first affording Mr. Figeroux an opportunity to respond and provide a justification or explanation for his

Figeroux performed work on behalf of Louima, he was a member of the firm of Thomas & Figeroux, the firm is entitled to the value of his services. Therefore, while the Court respectfully recommends that Figeroux be found to have personally forfeited his right to compensation for his services, his forfeited share should revert to the firm, or, in this case, the Estate of Carl Thomas as successor in interest to the firm.

H. Alleged Ethical Violations by CN&S and Rubenstein

The final issue remaining for this Court to address is T&F's argument that CN&S' and Rubenstein's conduct justified their forfeiture of fees in this case. Throughout the hearing, T&F argued that the manner in which CN&S and Rubenstein became employed by the Louimas violated the Disciplinary Rules.

Roper-Simpson has alleged that Rubenstein violated Disciplinary Rule 2-103 in the manner in which he became involved in representing Louima, and therefore should forfeit his fee. (R.S. Post-Tr. Br. at 12-16). She contends that Rubenstein's account of how he was contacted by members of Louima's family and then happened to visit Pastor Nicolas on the same day as Dr. Compas is not credible. (Id. at 12-13). Roper-Simpson questions why Rubenstein was not contacted immediately by Louima's family since he was at that time representing one of Louima's cousins, and argues that Mr. Roy's testimony about his conversation with Dr. Compas is more credible than that of either Dr. Compas or Rubenstein. (Id. at 14). Roper-Simpson contends that Rubenstein sought the assistance of Dr. Compas in his efforts to secure retention by the Louima family in violation of the Disciplinary Rules.

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conduct.

D.R. 2-103 prohibits an attorney from "solicit[ing] professional employment" directly from a prospective client "[b]y-in person or telephone contact." D.R. 2-103(a)(1), N.Y. Comp. Codes R. & Regs., tit 22, § 1200.8. Moreover, while the law is clear that an attorney may not enter into "a prior arrangement between lawyer and layman for the recommendation of legal business, or where there is the giving and receiving of any compensation for such recommendation," People v. Schneider, 20 A.D.2d 408, 410, 247 N.Y.S.2d 623, 625 (1st Dep't 1964); see also D.R. 2-103(B); In re Birman, 776 N.Y.S.2d 69, 70-71 (2d Dep't 2004); People v. Hankin, 182 Misc.2d 1003, 701 N.Y.S.2d 778 (2d Dep't 1999); In re Weinberger, 259 A.D.2d 592, 20 N.Y.S.2d 339 (1st Dep't 1940), the Canons and Rules do not "condemn[ ] the recommendation of lawyers to persons in a personal, social or professional relationship, pre-existing the making of the recommendation." People v. Schneider, 20 A.D.2d at 411, 247 N.Y.S.2d at 626. Indeed, D.R. 2-103 explicitly states that "a lawyer may solicit professional employment from a close friend, relative, former client or current client." D.R. 2-103(a)(1), N.Y. Comp. Codes R. & Regs., tit. 22,§1200.8.

In this case, apart from Mr. Roy's hearsay testimony that Dr. Compas told him that Rubenstein had asked for Compas' assistance, there is no evidence to support Roper-Simpson's argument. Dr. Compas specifically denied that Rubenstein had asked him to get Rubenstein involved in the case. (Compas Tr. at 173-74). Not only does this Court, having observed the testimony of all of the witnesses, credit Dr. Compas' testimony, but the Court also credits the testimony of Mr. Rubenstein who categorically denied that he sought out Dr. Compas in order to influence Louima's family to retain him. (R. Tr. at 34). Instead, Rubenstein's testimony is consistent with that of Louima, who testified credibly that Rubenstein was invited to the hospital by Louima's relatives,

and retained there. (L. Tr. 12-14). Roper-Simpson's speculation that the events did not happen this way because Rubenstein was not contacted immediately by the family given their prior relationship is simply that - sheer speculation. Indeed, according to Rubenstein's testimony, his office was contacted on August 11, 1997, the same day that Thomas and Figeroux were contacted. (R. Tr. at 32). Given that Louima's immediate concern at that time were the pending criminal charges, it makes sense that Rubenstein's services as a civil attorney may not have taken precedence, and according to both Rubenstein and Figeroux, the lawyer sent by Rubenstein to the hospital was turned away by Figeroux. Finally, Roper-Simpson's own notes indicate that it was Dr. Compas who contacted Rubenstein, thus undermining her own argument. (R.S. Tr. III at 23; Ex. 84).

Even if this Court were to find that Rubenstein reached out to Dr. Compas seeking an introduction to the Louima family, that alone, given Rubenstein's conceded prior relationship with the doctor and the doctor's relationship with the Louima and Nicolas families, would not constitute a violation of D.R. 2-103. Only if it could be demonstrated that Rubenstein had a monetary arrangement with Dr. Compas for the referral of clients would such an introduction violate the rule. Here, no such arrangement has been shown.

Accordingly, the Court finds nothing improper about the manner in which Rubenstein entered the case.

T&F also argue that Cochran violated the ethical rules by visiting Louima in the hospital without notifying T&F beforehand, in an effort to insinuate himself into the case. However, this Court credits Louima's and Cochran's testimony relating to the role of King Keno in arranging the initial meeting between Cochran and

Louima, and regarding Louima's ultimate decision to retain CN&S. Louima made it clear that he asked King Keno to reach out to Cochran and there has been no testimony or other evidence to suggest that Cochran solicited this call in any way. Indeed, Louima testified that he asked Cochran to represent him, not vice versa. Moreover, this Court credits Cochran's testimony that he notified Thomas prior to visiting Louima in the hospital and told Thomas that Louima had asked him to come. (C. Tr. I at 180-81). Thus, this Court finds no ethical violations on the part of CN&S relating to their initial retention by Louima.

T&F contend that as part of a campaign to exclude T&F, CN&S conducted a "broad investigation" without advising T&F of its scope, creating "practical and ethical concerns" for T&F. (T&F Post Tr. Br. at 25-26). T&F also contend that CN&S failed to inform the government that they had hired investigators and were interviewing witnesses. (T&F Post-Tr. Br. at 23-26; T. Tr. at 24950; P. Tr. at 71-73).

CN&S dispute these charges. Mr. Scheck testified that "[w]ith the knowledge of [Thomas and Figeroux,]" it was agreed that they would hire investigators. (S. Tr. I at 50). Among other things, Neufeld and Scheck visited the scene with Figeroux. (Id. at 51). Moreover, according to Scheck, not only were T&F aware that CN&S were pursuing their own investigation, but Palmer was aware as well. (Id. at 50). She knew that the lawyers had to do their own investigation but she did not want them to do a "full canvass" of everyone in the area. (Id.)

Mr. Scheck testified that he believed it was "[n]ot just appropriate, [but] essential and necessary" for the lawyers to separately investigate the facts surrounding Louima's case, "to make sure that anything that the client says in any sworn

proceeding, in any government debriefing, is the truth." (Id. at 48). He explained that it was not simply enough to tell your client not to lie because sometimes clients "for reasons that are misguided - - their desire to protect other people - - don't always tell the truth and don't understand the importance of a full disclosure to the government." (Id. at 49). CN&S was also concerned that the government authorities might limit their investigation to the Louima assault and not develop the information necessary to pursue a conspiracy claim against the PBA. (Id. at 50).

T&F argue that although Ms. Palmer testified that she had no objection to CN&S conducting an investigation into their pattern and practice theory for the civil case, she was not aware that CN&S had interviewed approximately 50 people who had been at the Club Rendez-Vous that night. (T&F Post-Tr. Br. at 24; C. Tr. II at 44). Similarly, Thompson testified that he was unaware that investigators had been hired and that witness interviews were being conducted by anyone other than the government. (T. Tr. at 249-50).

T&F's position in this regard is puzzling. While in the body of their brief they contend that the independent investigation by CN&S created "ethical concerns" for T&F, they concede in a footnote that there was nothing ethically improper about these interviews, but that they simply created practical concerns for the U.S. Attorney's Office. (Compare T&F Post Tr. Br. at 26 with 26 n.17). T&F fail to demonstrate that the investigation conducted by CN&S was in any way a violation of the Disciplinary Rules, or that it hindered either the government's case or Louima's civil case in any way. Based on all of the evidence, this Court finds that there were no ethical violations committed by CN&S in connection with their civil investigation that would justify a forfeiture of fees.

T&F contend that CN&S' failure to inform T&F of the Tacopina meetings was a violation of a provision of the Agreement By and Between Counsel, signed by the parties on October 6, 1997. That agreement required any signatory to the agreement to "promptly report[] to the other signatories" whenever there is "what reasonably could be considered to be a significant oral communication" in the Louima matter with a third party. (Ex. 60). CN&S did not deny that these were significant meetings. (C. Tr. II at 27-28; N. Tr. I at 135-36).

T&F further contend that CN&S' failure to inform T&F of the Tacopina meetings was part of CN&S' plan to marginalize T&F and increased T&F's suspicions regarding what other events may have been occurring without their knowledge. CN&S contend that because T&F did not learn of the meetings until after T&F had resigned, these meetings could not be a basis for T&F's resignation and had no impact on T&F's relationship with Louima. This Court agrees. First, while Roper-Simpson testified that Thomas first learned of the Tacopina meetings from Ken Thompson (R.S. Tr. I at 188), Thompson testified that Thomas learned about the meetings from newspaper accounts which were first published in November 1998, long after T&F had withdrawn from the case. (T. Tr. at 285, 287). Given that neither Thomas nor Figeroux ever mentioned the Tacopina meetings to CN&S or complained about their exclusion from these meetings until after they had withdrawn, their claim that this breach of the agreement between counsel was so significant as to cause T&F to withdraw and to warrant a complete forfeiture of CN&S' fees rings hollow. Moreover, while CN&S' failure to inform T&F of the meetings may have constituted a breach of the

agreement between counsel,[120] and may have hindered the prosecution's efforts to secure Wiesel's cooperation, it was not a violation of any ethical rules nor did it violate any responsibility they had to their clients, the Louimas. By contrast, T&F's continued statements to reporters, in violation of Louima's orders, and in particular, the comments accusing CN&S and Louima of ethical violations, were not only direct violations of the Disciplinary Rules' prohibition on the disclosure of client secrets but the disclosures clearly harmed Louima, and possibly damaged his credibility.

In summary, this Court finds that T&F have failed to establish any ethical misconduct on the part of CN&S or Rubenstein that would warrant forfeiture of their fees.

CONCLUSION

In summary, this Court respectfully recommends that CN&S' motion for an order forfeiting T&F's share in the fees due to their unjustified withdrawal from the case be granted.

In the event the district court disagrees, it is respectfully recommended that there be a significant reduction in T&F's fees based on T&F's unwarranted disclosures of client secrets to the press. This Court further recommends that, if they are to receive any fees, T&F's fees be limited to $212,222.50, of which $35,000 be distributed to Roper-Simpson, and that Figeroux be denied any right to share in those fees based on his conduct in connection with

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[120] Even if CN&S' failure to inform T&F of the Tacopina meetings did constitute a breach of the Agreement, that breach was excused by T&F's uncooperative and unreliable conduct prior to the Tacopina meetings, and by T&F's pattern of leaks to the press. This, therefore, does not constitute grounds to deny CN&S fees.

this dispute.

Finally, this Court respectfully recommends that T&F's motion to have CN&S forfeit their fees be denied.

Any objections to this Report and Recommendation must be filed with the Clerk of the Court, with a copy to the undersigned, within ten (10) days of receipt of this Report. Failure to file objections within the specified time waives the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72(b); Small v. Secretary of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989).

The Clerk is directed to mail copies of this Report and Recommendation to the parties.

SO ORDERED.

Dated: Brooklyn, New York
July , 2004

CHERYL L. POLLAK
United States Magistrate Judge